

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL DISTRICT  
OF JONES COUNTY, MISSISSIPPI  
ESTATE OF BURL BUTLER,  
Plaintiff,  
vs. CASE NO. 94--5-53  
PHILIP MORRIS, INC., et al.,  
Defendants.

VOLUME I

DEPOSITION OF: J. KENDRICK WELLS, III  
DATE: February 1, 1996  
TIME: 9:45 AM  
LOCATION: Law Offices of Brown, Todd & Heyburn  
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TAKEN BY: Counsel for the Plaintiff  
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ALSO PRESENT:

James Hayes Tracy Worsham  
Kathy McGregor

(INDEX AT REAR OF TRANSCRIPT)

A. WILLIAM ROBERTS, JR., & ASSOCIATES

THE VIDEOGRAPHER: We will open the  
record at 9:45 AM.

MR. MOTLEY: For the record, my name is  
Ron Motley with the law firm of Ness, Motley and  
others in Charleston, South Carolina; and I will be  
questioning the witness for the Plaintiffs.

THE COURT REPORTER: My name is Bill  
Roberts. I'm the court reporter.

MR. HAYES: My name is James Hayes. I'm  
a legal assistant with King & Spalding in Atlanta.

MS. FOX: Deirdre Fox, a lawyer with  
Kirkland & Ellis in Chicago.

THE WITNESS: I'm Kendrick Wells. I'll  
be the deponent. And I'm with Brown & Williamson  
Tobacco Corporation.

MR. BERNICK: David Bernick, Kirkland &  
Ellis for Brown & Williamson.

MR. McGAAN: Andrew McGaan, Kirland &  
Ellis, Brown & Williamson.

MR. HEWES: George Hewes, Brunini,  
Grantham, Grower & Hewes, representing Brown &

Williamson.

MR. GARNICK: Murray Garnick from Arnold & Porter for Phillip Morris.

MR. NORTHRIP: Bob Northrip, Shook, Hardy & Bacon for Phillip Morris and Lorillard.

MR. WOHNER: Collins Wohner, Butler, Snow, O'Mara, Stevens & Cannada for Lorillard.

MR. BIERSTEKER: Peter Biersteker from Jones, Day for R. J. Reynolds Tobacco Company.

THE VIDEOGRAPHER: A little louder, please.

MR. BIERSTEKER: Sorry. Peter Biersteker from Jones, Day for R. J. Reynolds Tobacco Company.

MR. McDERMOTT: Robert McDermott from Jones, Day for R. J. Reynolds.

MR. COLINGO: I'm Joe Colingo with Colingo & Williams for R. J. Reynolds.

MR. CORRIGAN: Michael Corrigan from Simpson, Thacher & Bartlett for Defendant B.A.T Industries, PLC.

MR. McLAUGHLIN: Joseph McLaughlin from Simpson, Thacher & Bartlett also for B.A.T Industries.

MR. ALSTON: Sheldon Alston from Alston, Rutherford & Van Slyke for the Council For Tobacco Research.

MR. CARTY: Patrick Carty from Latham & Watkins for Liggett.

THE VIDEOGRAPHER: I'm Paul Klapheke with Video Services.

MR. THOMPSON: I'm Todd Thompson, Hirn, Doheny, Reed & Harper, local counsel for the Plaintiff.

MS. FLOWERS: I'm Jody Flowers from Ness, Motley, counsel for the Estate of Burl Butler.

MS. WORSHAM: Tracey Worsham. I'm a paralegal with Ness, Motley.

MS. MCGREGOR: Kathy McGregor, paralegal at Ness, Motley.

MR. HERMAN: Maury Herman with Herman, Katz & Cotlar associated with Ness, Motley.

MR. BERLY: I'm Andy Berly with Ness, Motley for the Plaintiff.

MR. MOTLEY: Okay, I understand that counsel -- some people want to make a statement for the record, and we'll do so at this time.

MR. BIERSTEKER: Yes. Peter Biersteker from Jones, Day representing R. J. Reynolds Tobacco Company. I understand that certain documents that were stolen from Brown & Williamson may form the foundation for some of the questioning at this deposition. Some of those documents reflect privileged communications, and I think they fall into two categories:

The first category would be the joint defense doctrine, which is recognized by the Mississippi Rule of Evidence 502 (b) 3. Those are communications by Defendants in this action or counsel to lawyers representing other Defendants for the purposes of facilitating the rendition of legal services. This doctrine embraces not only communications made to give legal advice in connection with pending litigation but also to work

product and joint activities concerning pending legislative action.

Mississippi Rule of Evidence 502 (b) 3 allows Reynolds to prevent any other person from disclosing those confidential communications. This is true even if other members of the joint defense group may have waived or otherwise disclosed these joint defense privileged communications.

Reynolds does not consent to and does not waive its privileges with respect to those communications. It intends to assert its joint defense privilege as to them.

The second category of documents reflect materials that are privileged independently to Reynolds under the attorney-client doctrine or the attorney work product doctrine, and I intend to assert those privileges, as well. It's impossible to anticipate now each and every area that will implicate those privileges. I will make objections and appropriate instructions in response to particular questions.

Although it is not my intention to disrupt in any way your examination, I'm sure you will understand if from time to time I need to consult with other counsel or with the witness in order to determine whether or not an objection or instruction is appropriate.

MR. MOTLEY: In that regard, sir, if you intend to instruct this witness not to answer a question, at such time that you do that, we anticipated that such might occur, and we've asked our Mississippi counsel to alert the judge's secretary. And my understanding is he is on the bench in Laurel, Mississippi and available to conduct a hearing on the spot as to any such instructions by any counsel of this witness.

So the minute you do that, that's what we'll do.

MR. BIERSTEKER: That's find.

MR. GARNICK: I'd like to join in these objections on behalf of Phillip Morris and also request that if one Defendant makes an objection, it will be deemed to have been made by all Defendants.

MR. MOTLEY: An objection as to what, sir?

MR. GARNICK: The objection of the use of documents or the solicitation of testimony that might implicate the joint defense privilege.

MR. NORTHRIP: I join in the objection on behalf of Lorillard.

MR. CARTY: I join in the objection on behalf of Liggett.

MR. MOTLEY: We are agreeable to allowing Defendants to adopt the objections and the others -- of others asserted on the record, and I will merely state -- ask a question. I assume all of you join in that objection; if not, you should disassociate yourself and that will accommodate not having a chorus of the same objections, if that's okay.

MR. BERNICK: An objection for one is objection for all?

MR. MOTLEY: Right.

MR. NORTHRIP: Right.

MR. MOTLEY: Of course, the privilege objection has been ruled on by Judge Landrum in regard to Brown & Williamson, and I would state that objection -- that ruling will apply to your 502 (b), but that's for the judge to decide, not me. I didn't wear black today for that purpose.

MR. BERNICK: I'd like to make a statement on that particular subject briefly.

MR. MOTLEY: Sure.

MR. BERNICK: This deposition is taken pursuant to notice in the case of the Estate of Burl Butler. It's taken pursuant to the Court's January 17 Order regarding trial setting and scheduling order, which order Mr. Motley has already referred to.

As a consequence, we are cognizant of the fact that the deposition is also governed by Judge Landrum's Order of January 22 of this year. And in that order, the Court makes various determinations regarding the privileged -- the privileged status of documents that were stolen from Brown & Williamson. We believe that that Order is in error, but we are prepared to proceed with the deposition in compliance with that Order.

We have a continuing objection to the use of privileged materials that were the subject of this order. We will have that continuing objection to the point of trial and beyond. We preserve any and all privileges that apply to these documents for purposes of asserting that privilege subsequently in this case and in other cases. And to the extent that that privilege would also apply to related matters and related testimony, we also preserve our right to assert the privilege in those different areas at the trial of this case and in other proceedings.

MR. MOTLEY: Anybody else have anything they want to say? It's remarkable that we're starting almost on time.

Good morning.

Would you swear the witness on the record, please?

THE COURT REPORTER: Paul will swear him.

THE VIDEOGRAPHER: Sir, would you raise your right hand and be sworn, please.

J. KENDRICK WELLS, III  
being first duly sworn, testified as follows:

EXAMINATION

BY MR. MOTLEY:

Q. Mr. Wells, we've introduced ourselves off the record and on the record. I'm Ron Motley from Charleston, South Carolina, and I represent the Estate of Burl Butler, which is the only case in which this is noticed, but so you'll understand, I also represent other entities involved in tobacco litigation which are not noticed in this particular case; and if you would like for me to state that on the record, I'll be glad to do so. Otherwise, I'll just proceed to questioning.

Would you state your name and age for the record, again, please?

A. My legal name is John Kendrick Wells, III, and I'm 53 years old.

Q. And you live in the [DELETED] area?

A. I do.  
Q. Where did you go to college, sir?  
A. I went to Harvard University.  
Q. And law school?  
A. University of Kentucky College of Law.  
Q. And when did you graduate, sir?  
A. From law school in 1967.  
Q. And when did you join Brown & Williamson,  
sir?

A. I joined Brown & Williamson in the spring  
of 1972.

Q. And what is your current position with  
Brown & Williamson?

A. I am the assistant general counsel for  
product litigation.

Q. And to whom do you report directly?

A. I report to the general counsel, Tony  
Burke.

Q. And do your duties include giving counsel  
to various entities within the corporation?

A. I'm not sure I understand the term  
entities.

Q. Well, do you give counsel to various  
persons employed by Brown & Williamson?

A. Oh, yes.

Q. And do you own stock in the corporation?

A. I own some ADRs in B.A.T Industries.  
That's the only stock available to the public.

Q. B.A.T Industries being what, for the  
record?

A. That is the name of the corporation. It  
is the ultimate holding company for  
Brown & Williamson Tobacco Corporation.

Q. Sir, would you --

MR. MOTLEY: I would like, if you don't  
mind, Counsel, to attach as exhibit 1 Judge Landrum's  
Order to which we referred, and I'm sure we can have  
a copy made so you won't be without one.

If you would, Mr. Court Reporter, mark  
Judge Landrum's Order to which we have averted as  
exhibit number 1.

(PLF. EXH. 1, Judge Landrum's Order dated  
1/22/96, was marked for identification.)

BY MR. MOTLEY:

Q. While he's doing that, Mr. Wells, would  
you be kind enough to take a look at what will be  
exhibit number 2, and I'll take the stickies off of  
it when I'm done, put a clean copy in the record, if  
that's your signature, sir.

(PLF. EXH. 2, Answers to Interrogatories,  
was marked for identification.)

MR. MOTLEY: I will put a clean copy in  
the record, but I just want to identify his  
signature.

THE WITNESS: That's my signature.

BY MR. MOTLEY:

Q. Thank you, sir. And exhibit number 2  
purports to be a copy of the Answers of  
Brown & Williamson to Interrogatories or questions  
posed in the Butler case to the corporation, correct?

A. Yes, it does.

Q. And you were attesting and affirming to  
the accuracy of the answers provided in the document,

number 2, correct?

A. It says I was verifying the answers.

Q. And what do you understand verifying to mean?

MR. BERNICK: In connection with which answers?

MR. MOTLEY: In connection with the entirety of the answers.

MR. BERNICK: Well, answer if you can.

THE WITNESS: I understand it to mean that it's a certification that the answers are accurate to the best of my knowledge.

BY MR. MOTLEY:

Q. Very good, sir. Now, you have been attesting to or verifying the accuracy of answers of Brown & Williamson since what date, sir? I'm not talking about the Butler case, but any other case that you may have verified answers in, approximately what date?

A. I've been in litigation a long time. Probably since sometime in the mid 1980s. Your -- your question suggests continuity. I don't -- I don't as a continuing matter verify answers. Other people in the company do, as well.

Q. Okay. I have some Answers to Interrogatories which I'll be showing you during the course of this proceeding in the late 1970s. Would that refresh your recollection as to maybe you did verify some in the late '70s?

A. That's -- it's possible. If you have a document with my signature on it, that suggests I certainly did.

Q. Can I have that back, please, sir?

A. (Tendered)

Q. Mr. Wells --

MR. BERNICK: Hang on for a second. The folks at the end of the table can't hear when Kendrick speaks, and Kendrick is kind of soft spoken. I don't know, do you have any way of curing that problem, or is it just going to be a question of Kendrick trying to speak up as best he can?

THE VIDEOGRAPHER: Can we go off record?

MR. MOTLEY: Sure.

THE VIDEOGRAPHER: We'll go off the record.

(Off-the-record conference.)

THE VIDEOGRAPHER: We're back on the record.

BY MR. MOTLEY:

Q. Mr. Wells, are you familiar with lawyers employed by King & Spalding law firm mainly headquartered in, as I understand it, in Atlanta, Georgia?

A. Yes.

Q. And was King & Spalding and Vincent & Elkins involved in a project, to your personal knowledge, for Brown & Williamson in coding, summarizing and indexing corporate documents dealing with a myriad of subjects?

A. Yes, that's correct.

Q. And one of those was titled or styled taxonomy?

MR. BERNICK: Are you referring to the

title of a document?

MR. MOTLEY: Yes, sir.

THE WITNESS: I know about a --

MR. BERNICK: Excuse me. Is that a document we're going to see here and the witness is going to have the opportunity to take a look at?

MR. MOTLEY: Yes, sir. But I'm just asking background questions right now.

THE WITNESS: I know of a document called a taxonomy --

MR. BERNICK: You can -- you can talk about the title of a document. I'll instruct you not to answer questions regarding the content of the document unless it's before him. I want to comply with the terms of Judge Landrum's Order which speaks to documents. So you can go that far, and Mr. Motley's got another question to ask you.

BY MR. MOTLEY:

Q. You are familiar with the term taxonomy as it might have been attached or affixed to a document, correct?

A. Mr. Motley, I know the term. I hope you don't ask me to define it.

Q. No, sir. Anything with tax in it I avoid.

A. That's right. I know of a -- roughly of a document called taxonomy from reading about it in the newspapers as being one of the Brown & Williamson document collection that was made public. I have -- I've never reviewed it, even after it was made public, and I don't believe I had ever seen it prior to that time.

Q. Okay. So do you know whether or not of your own personal knowledge prior to the taxonomy that you read about in the newspaper that you just referred to there had been a different summary or an earlier summary of documents prepared either in-house by lawyers employed directly by Brown & Williamson or outside lawyers who were hired to do that task?

A. Mr. Motley, that's back into history further than I can go without you being more specific. I'm sorry.

Q. Well, the question is -- is I think fairly simple, Mr. Wells. And that is, before the so-called taxonomy document was prepared, was there a predecessor document of any kind, whatever its title might have been, which attempted to summarize, code, and index internal Brown & Williamson documents?

A. I'm --

MR. BERNICK: I think the question is ambiguous. If you can answer it, go ahead.

THE WITNESS: I'm concerned that it may call for a privilege, because unless you have a specific document that is covered by Judge Landrum's Order, you may be referring to something that is privileged.

BY MR. MOTLEY:

Q. Well, I'm not asking you to reveal the substance of it. I'm just asking you did -- did such exist to your personal knowledge.

MR. BERNICK: Just so -- the reason I let you answer the question is that I took the question just referred to the identity of a document.



MR. MOTLEY: Did one exist. That's all.

MR. BERNICK: Have you seen a document that existed that was a predecessor to the one that you read about in the newspaper? You can say yes or no in answer to that question if you have the knowledge.

THE WITNESS: I don't recall seeing something that I would consider a predecessor of that document talked about in the newspaper. It may have happened, but I don't recall it.

BY MR. MOTLEY:

Q. Sir, I'm not asking you what advice you might have given, but have you been called upon as a general proposition from time to time to offer legal advice to officers of Brown & Williamson corporation?

A. Yes.

Q. Sir, have you or anyone to your personal knowledge in the law department been requested to give testimony to a federal grand jury investigating Brown & Williamson?

A. No, that I'm aware of. I'm not -- I am not directly -- I'm not responsible at this time for any federal investigation. I think I would know if one of our lawyers had been asked to give testimony, and I know of no such instance.

Q. Are you familiar with the Sales Specialty Markets Division of Brown & Williamson?

A. Only vaguely. I do not counsel the sales department.

Q. What vaguely do you know about the Sales Specialty Markets Division of Brown & Williamson?

A. Just by the title, all I can remember is that there has been a unit of the Brown & Williamson sales department that had something like that name. The title specialty, I believe, meant that it had specific duties, but I can't recall without some refreshment exactly what its involvement is.

Q. Do you know a gentleman named Tom Whitehair? And if I'm mispronouncing his name, I apologize. It's spelled like I pronounced it.

A. I think you're right on. Yes, I do.

Q. And who is he, sir?

A. Tom Whitehair is retired recently. He retired as a senior vice president of marketing.

Q. And have you counseled Mr. Whitehair on any matter in the course of your duties about --

A. Yes, sir.

Q. You have?

A. Yes, I have.

Q. Is there someone in your law department whom you might know that provides legal services or legal counsel to the sales specialty markets?

A. Yeah.

Q. Who might that be, sir? I don't want to know what they said or did, just who it might be.

A. We've recently reorganized the duties in the law department, so I'm trying to get this straight.

Q. Who might have previously given such advice to --

A. Oh, that's helpful. Thank you. Bart Friedman and John Kiser.

Q. Do you know whether or not the Sales

Specialty Markets Division received outside counsel from King & Spalding?

A. I do not know.

Q. Same question, Vincent & Elkins?

A. I do not know.

Q. Same question, Jones, Day?

A. I'm not aware of Jones, Day advising Brown & Williamson.

Q. Same question, Kirk -- Kirkland & Ellis?

A. I'm not aware of -- I'm not aware of it.

Q. Do you know the name of any law firms that might have provided outside counsel, advice -- I don't want to know the advice, just the name -- to the Sales Specialty Markets Division of B&W?

MR. BERNICK: Who might have?

MR. MOTLEY: Who he thinks may have provided legal service sometime in the past.

MR. BERNICK: Object to the form of the question. It calls for speculation. Answer if you can.

THE WITNESS: By in the past --

BY MR. MOTLEY:

Q. In the last ten years.

A. Do you mean --

Q. Before the reorganization that you just referred to.

A. Well, that was very recent. What I'm thinking about is there -- we know from the newspapers that there is an investigation out of New Orleans.

Q. Yes, sir.

A. That probably involves that unit, and there is counsel for that investigation. Are you speaking of prior to that operations, Counsel?

Q. Well, let's start with the counsel for the New Orleans proceedings. Do you know the name of the firm? I don't want to know anything more than that right now.

A. King & Spalding is involved in counseling regarding the investigation.

Q. And prior to the counsel being provided to -- for the investigation, do you know the name of a firm that may have given legal advice to that division, the Sales Specialty Markets Division? I don't want to know the advice, just the name.

A. I don't.

MR. BERNICK: Same objection as before. It calls for speculation.

BY MR. MOTLEY:

Q. Do you know anything, sir, about the transfer of imported tax-free Brown & Williamson cigarettes from a bonded B&W contracted warehouse in Mobile, Alabama to something called Lamendola's warehouse outside New Orleans?

MR. BERNICK: At this point I'm going to caution the witness that question may call for the divulgence of privileged information; and to the extent that it does, I'll instruct you not to answer the question.

MR. MOTLEY: Counsel, you're saying that -- that it may call for privileged information without asking him about it? I don't know whether it will or it won't.

MR. BERNICK: Well, your question -- your question assumes that all those facts are true and asks whether he's heard about them.

MR. MOTLEY: No, sir.

MR. BERNICK: Well, then why don't you rephrase your question because maybe I misunderstand the question.

BY MR. MOTLEY:

Q. Okay. All I'm asking is, have you heard anything about the facts, the alleged facts, that I just related? I don't want to know what you've heard. I'm just asking if you know anything about it.

MR. BERNICK: Answer the question yes or no without assuming any of those facts are true. Have you heard about those claims? Yes or no.

THE WITNESS: I've heard about the claims.

BY MR. MOTLEY:

Q. Do you know, sir -- and I don't want to know anything other than the name -- of anyone within the legal department of Brown & Williamson who is working with King & Spalding on the alleged facts coming out of an alleged grand jury investigation in New Orleans of the Sales Specialty Markets Division? I've got enough allegations in there for an alligator, so if you'll kindly answer that.

A. Yes, I do.

Q. Who would that be, sir?

A. John Kiser and Tony Burke.

Q. Do you know anything about the allegation that Lamendola's maintained paperwork to show cigarettes were sold to offshore boats when, in fact, they were being smuggled tax-free over the New York border into Canada?

MR. BERNICK: Again --

BY MR. MOTLEY:

Q. Yes or no, do you know anything about it? If not -- I'm not asking you what you know, I'm just asking if you know anything about it, the allegations?

MR. BERNICK: Even if he's read about it in the newspaper, it's a yes or no?

MR. MOTLEY: Some of this he hasn't read about in the newspaper unless there's a newspaper report about this that I don't know anything about.

MR. BERNICK: Well, you can answer the question yes or no if you've heard of that allegation.

THE WITNESS: Counsel, should I answer it even if all my information comes from my duties as counsel?

MR. BERNICK: If all of your information on that subject comes from your duties as counsel, then I would instruct you not to answer the question.  
BY MR. MOTLEY:

Q. Sir, do you know or have you heard anything as to whether or not Brown & Williamson sold cigarettes to Lamendola's?

MR. BERNICK: You can answer that question to the extent that you have any information that comes to you outside of your duties as counsel to the company, that is, if you have received that

information from sources that are not involved in the solicitation of advice or counseling from you or others at Brown & Williamson; but you are otherwise instructed not to answer the question.

THE WITNESS: All of my information about the subject matter you've inquired about comes from providing legal counsel.

BY MR. MOTLEY:

Q. Sir, do you know whether or not any attorneys within Brown & Williamson or representing Brown & Williamson in the alleged grand jury investigation have asserted attorney-client privileges against testimony before the grand jury?

MR. NORTHRIP: Mr. Motley, is this deposition being conducted in the Butler case?

MR. MOTLEY: Yes, sir, it is, Mr. --

MR. NORTHRIP: Northrip.

MR. MOTLEY: -- Counsel. It certainly is because this gentleman signed under whatever you want to call this attestation the accuracy of the Answers to Interrogatories in the Butler case.

MR. BERNICK: The witness is instructed not to answer that question on the grounds that it calls for information which is privileged and is protected by the confidentiality and privileges that apply to the grand jury proceeding.

BY MR. MOTLEY:

Q. Do you know whether or not, sir, or have you acquired any information as to the allegation that Brown & Williamson conspired with Lamendolas to smuggle cigarettes illegally into Canada?

MR. BERNICK: Again, to the extent that that question calls for information that is information that came to you in your capacity as counsel for Brown & Williamson, you're instructed not to answer the question.

THE WITNESS: All of the information I have on that subject, Mr. Motley, came to me in performance of legal counsel.

BY MR. MOTLEY:

Q. Have you learned anything, sir, about the allegation that Brown & Williamson officials or employees, to use a more general term, assisted in the falsifying of Lamendola's books, record books?

MR. BERNICK: Same objection. Same instruction to the extent that it calls for information that you received during the ordinary course of your duties as counsel for Brown & Williamson.

BY MR. MOTLEY:

Q. Sir, do you know the names of any --

MR. BERNICK: Excuse me.

MR. MOTLEY: Oh, I'm sorry, I thought you agreed.

THE WITNESS: Under that instruction, I can't answer the question.

BY MR. MOTLEY:

Q. Do you know personally of anyone within Brown & Williamson currently employed or formerly employed who have been invited to testify before the grand jury in New Orleans? Just the names.

MR. BERNICK: Mr. Wells, again, you're instructed not to answer that question on the same

grounds and on the additional grounds that it seeks to elicit information about grand jury proceedings which are protected.

THE WITNESS: All of the information I have on the subject came to me in the performance of counsel, legal counsel.

BY MR. MOTLEY:

Q. Sir -- is it true, sir, that agents of the federal government served a subpoena on Brown & Williamson in late 1994 to obtain records relating to alleged conduct of the Sales Specialty Markets Division? Do you know whether or not such a subpoena was served?

A. I think that's correct.

MR. BERNICK: You're -- you can answer the question in terms of whether a subpoena was served. The content and subject matter of that subpoena, again, I believe is protected, and you're instructed not to answer the question as far as the content is described.

BY MR. MOTLEY:

Q. Do you know upon whom the subpoena was served, sir?

A. I don't recall the contents of the subpoena, and I don't recall it being an individual subpoena.

Q. Did you, sir, come -- and I don't want to -- I don't want to ask you at this time what was in the subpoena, but did you personally review the subpoena? Did you see it in the context of being an employee of Brown & Williamson?

A. I looked at it briefly.

Q. Sir, shortly before the subpoena was served, did Brown & Williamson's law department change its document retention process?

MR. BERNICK: Well, let's get a -- I think your question is really just a question about time and document retention.

MR. MOTLEY: Correct.

MR. BERNICK: If you could fix a time.

MR. MOTLEY: Well, I don't know the time. I wasn't there. But I'm asking the witness if shortly before, let's say in the fall of 1994, did Brown & Williamson at the suggestion of the law department change their document retention policy?

MR. BERNICK: To the extent that your question now seeks to elicit advice received from the law department, the witness is instructed not to answer the question. If you want to ask the question -- a factual question or whether Brown & Williamson adopted a new document retention policy at a certain point in time, I think that is a question that the witness may or may not be able to answer but is a proper question.

MR. MOTLEY: I'll accept that amendment as a friendly one.

BY MR. MOTLEY:

Q. And will you answer that question?

A. The answer, to my knowledge, is no.

Q. Do you know whether anyone at the -- at Brown & Williamson told federal investigatory officials that the retention policy had been changed shortly before the subpoena was served? I just want

to know if you know that.

MR. BERNICK: Same objection -- same objection as before. It calls for privileged information, information protected as part of the investigation.

BY MR. MOTLEY:

Q. Sir, do you deny that Brown & Williamson destroyed documents prior to the subpoena being served upon them in December of 1994?

MR. BERNICK: Object to the form of the question. It's also -- it's ambiguous. Over what period of time, what kind of documents, where?

MR. MOTLEY: Any kind of documents over any period of time that were in obedience to the subpoena that was subsequently served. He is a very intelligent man. I don't think he has any problem understanding that.

MR. BERNICK: Well, that's yet a different question. Object to that --

MR. MOTLEY: See, I talk southern, and you don't. He's probably having an easier time understanding me than he is you.

MR. BERNICK: I'm real comfortable, Mr. Motley, that Mr. Wells and you can understand every word that I say.

MR. MOTLEY: I certainly can.

MR. BERNICK: And your question assumes that the witness is knowledgeable concerning the content of the subpoena, what would be required in order to comply with the subpoena. To that extent, it calls for information which is privileged and protected.

BY MR. MOTLEY:

Q. Let me rephrase it. Did you see anybody carting out boxes of documents out of the law department before the subpoena was served in the fall of 1994?

MR. BERNICK: For any purpose?

MR. MOTLEY: Any documents carted out of the law department before the subpoena was served in December 1994.

MR. BERNICK: I object to the form of the question. Answer if you can.

THE WITNESS: I don't -- I'm not aware of any documents being carted out, as you say, from the law department, which I assume you mean to be in other than the normal course of business.

BY MR. MOTLEY:

Q. Would the normal course of business have included destroying documents related to the Sales Specialty Markets Division of Brown & Williamson?

MR. BERNICK: Objection to the form of the question. Also lack of foundation. I don't know what you're asking about now. You're asking him to talk about what was going down in the Specialty Markets Division? You haven't established that he's knowledgeable about that, what point in time, what documents.

MR. MOTLEY: I just want to know what he knows.

MR. BERNICK: What he knows about what?

MR. MOTLEY: What he knows about what I asked him.

MR. BERNICK: Ask him a fair question, Mr. Motley. I'm sure he'll be happy to respond.

BY MR. MOTLEY:

Q. It's a very simple question, sir. Do you know whether or not any documents relating to the Sales Specialty Markets Division of Brown & Williamson were destroyed or removed from Brown & Williamson in the fall of 1994 prior to the subpoena being served by federal officials in December 1994, whether it was in the ordinary course of business or whatever?

A. Mr. Motley, I don't know. But let me say at this point, I don't counsel the sales department, and I was only incidentally involved with the visit by customs agents to Brown & Williamson on the occasion of the subpoena you mentioned.

Q. Sir, have you been called upon to -- or subpoenaed before any grand -- federal grand juries convened in Washington or New York --

MR. BERNICK: I'm sorry, I apologize, Counsel. I was conversing with my colleague here, and I missed the first part of your question.

BY MR. MOTLEY:

Q. I'll start over. Sir, have you been asked to present testimony before any federal grand jury proceeding in Washington, DC or New York City?

A. No.

Q. Do you know whether any member of the legal department has been requested to testify before grand jury proceedings in Washington, DC or New York City?

MR. BERNICK: I instruct the witness not to answer the question on the grounds of privilege and the confidentiality of the proceeding.

BY MR. MOTLEY:

Q. Specifically, sir, did Brown & Williamson's document retention policy change on December 15th, 1994?

A. Not to my knowledge.

Q. In 1994, at any time in 1994, was a document retention policy implemented which provided that any document over 30 days old was to be destroyed?

A. Your question sounds something like a provision that has been in the document retention program that's been in force for years. It certainly does not say destroy documents more than 30 days old. And I have not -- I'm not aware of that direction being given to employees at Brown & Williamson.

Q. Have you acquired any information as to whether or not a Brown & Williamson employee tipped off -- I'm using those words precisely, in quotation marks -- B&W's legal department of the justice department investigation into the alleged conduct of the Sales Specialty Markets Division of Brown & Williamson?

MR. BERNICK: Your question, to the extent that the witness even could answer it, calls for privileged information. The witness is instructed not to answer the question.

BY MR. MOTLEY:

Q. Sir, as an attorney, have you knowledge

about something called the Crime Fraud Exception to Attorney-client Privilege? I'm not asking your knowledge; I'm just asking if you've ever heard of it.

A. Yes.

Q. Prior to asserting a privilege in Answers to Interrogatories which you have attested to on any occasion, did you consider whether the Crime Fraud Exception might apply prior to asserting the privilege for the corporation?

MR. BERNICK: Well, I think that there are a bunch of problems with your question, Mr. Motley. One, I don't know what particular interrogatory answer you're talking about. And number two, that question calls for the witness to give you his legal thought process in connection with the assertion of a privilege, and you know as well as I do that that's a privileged matter.

MR. MOTLEY: Well, I don't know that quite as well as you do, but --

MR. BERNICK: Well, I think it is, at least in our view, and I'll instruct the witness not to answer the question.

MR. MOTLEY: Okay.

BY MR. MOTLEY:

Q. Sir, do you know whether or not the law department ever received a request in writing or orally from the Specialty Markets Division -- and I've left out a word there -- Sales Specialty Markets Division regarding the legality or illegality of the sale of cigarettes to gulf area offshore crew boats?

A. I don't know.

Q. Are you familiar with a Bivens, B-I-V-E-N-S, lawsuit filed in federal court in Las Vegas, Nevada in February 1995 by -- by the corporation, I'm sorry?

A. Yes. I saw either a draft or a final version of the Complaint and that's the extent of my knowledge.

Q. Do you recall the -- and this was filed publicly in a federal court, correct?

A. That's my understanding.

Q. Were you consulted by Mr. Sandefur at any time in regard to the decision to withdraw that lawsuit?

A. No.

Q. Are you personally aware whether -- by Mr. Sandefur or anyone else -- why that lawsuit was brought?

A. No.

Q. Did you have any discussions -- I don't want to know the substance of the discussions at this time -- with any of the federal customs agents who served the subpoena upon Brown & Williamson in December 1994? You personally.

MR. BERNICK: You can answer that question yes or no.

THE WITNESS: Yes.

BY MR. MOTLEY:

Q. Do you recall the name of the agent or agents with whom you had such a discussion?

A. No.

Q. Were you told by such agents with whom



you had such a discussion that you or anyone in the legal department were the subject of an investigation by the grand jury in New Orleans?

MR. BERNICK: Object to the question and instruct you not to answer on the grounds of privilege and on the grounds that it would violate the protections that apply to the investigation.

MR. MOTLEY: Violate the who?

MR. BERNICK: Protections that apply to the investigation.

MR. MOTLEY: Do you mean the Fifth Amendment?

MR. BERNICK: I meant what I said, Counsel.

BY MR. MOTLEY:

Q. Do you know Mr. John Scanlon?

A. You know, that name is familiar. I think I do know him. I don't know him well enough to recall what his face looks like.

Q. Do you know whether or not there was a discussion in the legal department in regard to the retention of Mr. Scanlon?

MR. BERNICK: You can answer the question --

BY MR. MOTLEY:

Q. I don't want to know what the discussion is; I just want to know if you had one.

A. I do not know.

Q. Do you know when Mr. Scanlon was hired by Brown & Williamson?

A. I don't know that he was.

Q. Have you seen --

A. I take that back. I heard a conversation the other day that's not privileged --

MR. BERNICK: Okay.

THE WITNESS: -- providing advice or providing information, and the statement is John Scanlon is doing work for Brown & Williamson. I don't know the circumstances of the employment.

BY MR. MOTLEY:

Q. Is it your testimony, Mr. Wells, that you have not seen the results of an investigative report by a firm called I.G.I. in regard to Jeffrey Wigand?

A. I have not.

Q. Did you see The Wall Street Journal this morning?

A. I did not.

Q. Are you involved in any fashion with -- and I don't want to know what you've done yet -- but are you involved in any way with obtaining information related to Jeffrey Wigand in connection with his testimony in this case, Mr. Butler's case?

MR. BERNICK: You can answer the question yes or no. It's a very -- it's a very ambiguous question. Any information related to Jeffrey Wigand?

MR. MOTLEY: Yes.

BY MR. MOTLEY:

Q. Subsequent to his testimony, have you been involved in any investigation of facts surrounding Mr. Jeffrey Wigand?

MR. BERNICK: Again, you can answer yes or no.

THE WITNESS: It's a -- it's a very broad question. Do you mean facts regarding his --

BY MR. MOTLEY:

Q. Anything. Anything.

A. Anything?

Q. His personal life, his sex life, his church life, if he has one.

A. If it's personal life --

MR. BERNICK: Excuse me, Kendrick. All those questions, though, do relate to Jeffrey Wigand personally. Jeffrey Wigand worked at the company for a number of years and that's why the question is so broad.

Are you asking any aspect of Jeffrey Wigand's activities while at Brown & Williamson, or are you focused on Jeffrey Wigand personally?

MR. MOTLEY: Both, and then I'll separate it out.

MR. BERNICK: Object to the form of the question. Answer the question yes or no.

THE WITNESS: Yes.

BY MR. MOTLEY:

Q. Have you been involved in any aspect of the investigation of Jeffrey Wigand prior to his employment with Brown & Williamson or subsequent to his employment with Brown & Williamson?

A. No.

Q. Have you been involved in the search for an -- for an alleged group of minutes that were prepared after a conference of scientists allegedly took place in Vancouver, British Columbia?

MR. BERNICK: Put the question again. I'm sorry.

MR. MOTLEY: That's all right.

MR. BERNICK: It has so many parts to it. Go ahead.

BY MR. MOTLEY:

Q. Let me ask this foundational question first, sir. Have you reviewed the transcript of the partial deposition of Dr. Wigand which I took for the plaintiffs in the State of Mississippi and Mr. Butler in November of 1995?

A. I read through it quickly.

MR. BERNICK: Go ahead. Let's -- if we could take a break, perhaps. I want to go off the record and pose an issue to counsel here in connection with that transcript.

MR. MOTLEY: Yeah.

THE VIDEOGRAPHER: We'll go off the record.

(Off-the-record conference.)

THE VIDEOGRAPHER: We're back on the record at 10:38 AM.

MR. MOTLEY: We withdraw the last question from the record and would ask the court reporter to -- to type that up separately. We'll place it under seal and give it to Mr. Colingo to take back to Pascagoula, whatever counsel wants to do with it.

MR. BERNICK: Just so we're clear, those are the questions, Counsel, that relate to the transcript of the Wigand deposition?

MR. MOTLEY: Correct, the deposition

itself.

(By agreement of counsel, a portion of the transcript has been excerpted and designated as confidential.)

BY MR. MOTLEY:

Q. What happened to the minutes of the alleged meeting in Vancouver, British Columbia?

A. The -- we're talking about the meeting in Vancouver, Columbia that, as I recall, was 1989?

Q. Yes, sir, I believe that's correct.

A. We received a copy of those minutes, and it came in to Jeff Wigand. Jeff Wigand sent me a copy after he had made some notes on it, I think; and my recollection is he sent it to others. I talked with Jeff about it, and Jeff said there were some problems with those minutes. He thought they were inaccurate.

We then involved Ray Pritchard who is the CEO at Brown & Williamson because this CEO is responsible for relationships with the other B.A.T companies. This was a conference, of course, of scientists from Brown & Williamson and British American Tobacco Company in the UK and perhaps others.

There was a meeting at which Jeff Wigand said that the meeting -- the minutes we received were inaccurate. Mr. Pritchard objected to the minutes because he believed they misstated the status of matters, and he assigned Jeff Wigand to produce a revised set of minutes.

BY MR. MOTLEY:

Q. Now, where are the original inaccurate minutes?

MR. BERNICK: Are you talking about the draft minutes?

BY MR. MOTLEY:

Q. The ones that you say Dr. Wigand said were inaccurate.

A. There is a set that I know of in the law department files. There may be others. I believe Jeff has sent it around.

Q. Sir, do you -- do you deny that prior to right now -- what's today -- February 1st, 1996, that your law department in Answers to Interrogatories have never mentioned the existence of the minutes, inaccurate or not, of the Vancouver, British Columbia meeting of scientists in 1989?

MR. BERNICK: That question is -- is so hobbled with ambiguity, I don't know what you're asking him. Which --

MR. MOTLEY: Maybe he does.

MR. BERNICK: Which interrogatory? He doesn't have to guess. You've got to be fair with him, Counsel.

MR. MOTLEY: Any Interrogatories he's ever signed.

MR. BERNICK: Excuse me, let me make my objection. Which Interrogatories, which interrogatory, and why don't you put it in front of him so he can take a look at it.

MR. MOTLEY: I'm asking him, testing his recollection.

BY MR. MOTLEY:

Q. Sir, can you tell me since you have answered -- I'm not saying you've attested to all the Interrogatories ever filed by Brown & Williamson in product liability smoking and health lawsuits. I'm asking you, to your recollection, have you attested to the accuracy of Interrogatories which sought information about scientific meetings discussing smoking and health and failed to mention the existence of the minutes to which you now refer?

MR. BERNICK: Object to the form of the question. It's compound, and it's completely unfair to the witness. If you can identify a particular interrogatory that called for that information and put it in front of the witness, I'm sure he'll be happy to give it an answer, but all you're trying to do is argue with him at this point.

MR. MOTLEY: I'm not arguing with him, sir. I'm asking whether he recalls ever revealing prior to today the existence of the minutes, inaccurate or not, to which he just referred.

MR. BERNICK: The record should reflect that there are copies of Interrogatories that have been tendered over here. I see copies of Interrogatories on the table behind Mr. Motley. You told the witness at the beginning of the deposition you were going to ask him about Interrogatories and what he verified. And now you're sitting there asking the question, and you know all of the stuff because you looked at it. The witness is sitting there not knowing what Interrogatories you're asking from. You're telling me that's a fair question to this witness, Counsel?

MR. MOTLEY: I'm not having to answer your questions, sir. If you want to instruct him not to answer the question, we'll call doctor -- doctor -- doctor, Judge Landrum and find out what he thinks about it. But you're saying he can answer the question.

Let me rephrase it since we've had all this on the record.

BY MR. MOTLEY:

Q. Sir, do you deny that prior to February 1st, 1996, you, acting on behalf of Brown & Williamson, have never revealed in any Interrogatories that you attested to the accuracy of filed in any court in the United States of the existence of these minutes of the Vancouver, British Columbia scientific conference in 1989?

MR. BERNICK: Object to the form of the question. That's a question that Mr. Motley would like to quote to the press, but it's not a fair and proper question under the rules that apply to this case. Answer it if you can.

THE WITNESS: Mr. Motley, it's just very unfair to do this without specific Interrogatories and answers. You know, you pointed out to me that I didn't remember how far back in time that I was verifying Answers to Interrogatories.

BY MR. MOTLEY:

Q. Well, you admitted you started before 1989.

MR. BERNICK: Hang on. Hang on. Were you done, Mr. Wells?

THE WITNESS: No. Your question assumes that the -- these minutes you're talking about were called for in answer to some Interrogatory. It's so vague that I just -- the only answer I can give you is I don't know.

BY MR. MOTLEY:

Q. You don't know. Sir, do you recall in attesting to the truthfulness of Interrogatories that you filed on behalf of Brown & Williamson at any time from 1988 to yesterday being asked to reveal the existence of minutes or notes of any scientific meeting at which Brown & Williamson scientists were in attendance and for which minutes were taken?

A. I don't recall the interrogatory, but it sounds like a document production request to me. I'm not -- and if it's been required as a document production, I'm sure we've handed it over.

Q. Okay. Are you familiar with Answers to Interrogatories filed in the case of The State of Minnesota versus Brown & Williamson in which your company was required to list all documents ever turned over to any party plaintiff in any smoking and health litigation?

A. Not familiar enough that I can recall it.

Q. Well, can you tell me, sir, whether or not your company advised the Court in Minnesota that they had turned over the minutes of the British Columbia meeting of 1989 to any party plaintiff previously?

MR. BERNICK: Mr. Motley, there is no foundation for that question. You just asked him whether he was knowledgeable concerning a request in that case. In the compliance with that, I believe he told you that he wasn't knowledgeable about it, and then you proceeded to ask him a question about what was turned over. Let's get the predicates out there, and then you can ask him what was done to respond.

MR. MOTLEY: It's a very simple question, Counsel.

BY MR. MOTLEY:

Q. That is, Mr. Wells is the assistant general counsel to Brown & Williamson in charge of product liability litigation; is that correct?

A. I'm the assistant general counsel of Brown & Williamson for product litigation. I think in charge of may not be accurate.

Q. Okay. You're familiar with product litigation, aren't you? That's part of your responsibility?

A. I do manage product litigation.

Q. Okay, sir. Are you familiar with the requirement of the Court in Minnesota that the parties defendant be required to place in the document depository a list of documents previously produced to plaintiffs in any smoking and health litigation in the United States?

MR. BERNICK: Now I know that you've been unfair to this witness because you were asking about questions and Interrogatories. Now you're referring to Court order, and you're talking about an instruction to place in the depository. It's very different from the questions you were asking before, Mr. Motley.

I urge you to be fair to the witness. If you want to talk about a case, if you want to talk about requests that have made of counsel to Brown & Williamson, be fair with the witness, give him the request so we can have the same benefit of the information that you do.

MR. MOTLEY: Why don't you be fair to the filing of documents in court, sir, and I'll be fair to the witness.

BY MR. MOTLEY:

Q. Do you know, sir, whether or not your company was required to provide a list of documents that they had previously turned over to litigants for the plaintiff in litigation pending anywhere in the United States?

A. Mr. Motley, I would like to help you, but I don't recall. We've got so much litigation going now, you know. You're suing us in several courts, and those cases are rather document intensive. Just the correspondence in Minnesota regarding what that order should say and how we go about responding to it have already filled a file cabinet.

And we have to have some division of labor, and I simply can't keep up with the correspondence and details related to the document depository, certainly not as well I would like to. And I just don't recall that specific detail.

Q. You don't recall whether or not you were even required to provide a list of documents you had turned over to litigants in prior litigation?

A. I don't recall it, sir.

MR. MOTLEY: Mark this as 3, please?

MR. BERNICK: Ron --

MR. MOTLEY: Yes, sir.

MR. BERNICK: -- are we getting to a good point at some point here this morning to break soon?

MR. MOTLEY: Give me about five more minutes.

MR. BERNICK: Okay.

(PLF. EXH. 3, Letter from Allen M. Katz to Roberta B. Walburn dated 4/21/95 with attachments, was marked for identification.)

MR. BERNICK: I assume we'll just have another copy of this put into the record that doesn't have the highlighting?

MR. MOTLEY: Yes.

BY MR. MOTLEY:

Q. Sir, are you familiar with the filing made on behalf of Brown & Williamson by the law firm designated in exhibit number 3? Would you kindly tell me the date of that? I believe it's April the 21st, 1995.

MR. BERNICK: I think in fairness, this is a letter from another law firm that doesn't represent Brown & Williamson. So I don't know that it's really a filing, but go ahead and answer if you can.

MR. McDERMOTT: Ron, for the record, can we get these exhibits identified?

MR. MOTLEY: Yeah. I wanted to see if he had seen it before I identified it.

MR. BERNICK: Just the question is

whether he's familiar with this?

MR. MOTLEY: That's the first question, yes, sir.

MR. BERNICK: Okay.

THE WITNESS: I'm not familiar with this document. I could have seen it.

BY MR. MOTLEY:

Q. Can you tell us, sir, whether you would agree with the assertion made in the letter specific to Brown & Williamson -- and I have tagged that for you to look at on the top -- that heretofore Brown & Williamson had produced only five pages of documents in litigation? Is that true or not?

MR. BERNICK: Hang on. If you want to ask him that question factually, I've -- I've got no problem with it. This document -- and I don't know that you know this, Mr. Motley, because I don't think you are -- Minnesota may be the only state that you're not in.

MR. MOTLEY: I'm moving north, rapidly, sir.

MR. BERNICK: Oh, is that right? Well, you're welcome to come on up and join us there.

MR. MOTLEY: It's a nice place to be.

MR. BERNICK: This is a volume estimate that was provided by all the companies on the numbers of documents that have been produced in prior litigation. It is not a formal court filing. This was done pursuant to arrangements made in connection with the initial discovery in the case. So you represented in your questions this was a Court order and formal filing pursuant to the Court order.

In point of fact, this is simply correspondence with Plaintiff's counsel. If you want to ask the witness -- it's volume estimates. If you want to ask the witness the factual question of what was produced in prior individual smoking and health cases against Brown & Williamson, I'm sure he'll be able to answer the question.

MR. MOTLEY: Let me rephrase the question, sir.

BY MR. MOTLEY:

Q. This letter purports to provide to Plaintiff's counsel an estimation of the number of pages produced in the past by Brown & Williamson, and will you agree with me that what was provided to Ms. Walburn states that five pages were produced historically?

A. Can you direct me to that statement, Counsel?

MR. BERNICK: He's got it flagged back here.

THE WITNESS: I was looking at the first page which has a different statement. I see that statement in this letter from the coordinating counsel of Munger & Tolles.

BY MR. MOTLEY:

Q. Five pages?

A. That's what it says.

Q. Is that correct, to your knowledge?

A. Do you mean --

Q. Is it five or six or 106 or what; do you know?

A. Well, is your question about whether -- whether this is a correct statement of what had been produced in discovery?

Q. That's what I want to know, yes, sir.

MR. BERNICK: In prior individual lawsuits against Brown & Williamson, I think, just so we're clear. Individual personally -- personal injury cases since 1981.

BY MR. MOTLEY:

Q. From 1981 to the date of that letter, is that number or estimate of five pages previously produced accurate or inaccurate?

A. I believe it's inaccurate.

Q. If you will kindly look at the first page, the last sentence of the first paragraph, which reads: I have been informed by Brown & Williamson's counsel that all of B&W's transcripts, requests for admissions and responses to Interrogatories for individual smoking and health personal injury cases since 1981 comprise less than one box in volume.

Is that an accurate statement?

MR. BERNICK: Just so the record's clear, that's a statement made by counsel for another company in their capacity as coordinating counsel?

MR. MOTLEY: Right. It purports to be based upon information provided by B&W counsel, whomever that might be. I will get to that in a minute.

BY MR. MOTLEY:

Q. Is that an accurate statement, sir, to your knowledge, one box, less than one box, everything from 1981 to 1995?

MR. BERNICK: No, no. Wait. Not everything. This is individual personal injury cases.

MR. MOTLEY: Okay.

THE WITNESS: Mr. Motley, I am sure that Brown & Williamson is and will continue to comply fully with the discovery requirements of the Court in Minnesota, and we'll try to fill up that depository up there with what the Court has said that we should provide. I have no idea what volume of the Brown & Williamson's previous court filings in the way of admissions and responses to Interrogatories would be. I just don't know. I never thought about it.

BY MR. MOTLEY:

Q. Who would know? Somebody must have told somebody that there was less than a box.

A. The issue that's been raised in the press is -- would refer to the other point of this statement and that is the volume of Brown & Williamson's document production.

As to the volume of our document production, to my knowledge, the schedule that you directed me to is correct in that it lists only the Dewey case, which is a New Jersey case. I think the number of pages produced were probably a few hundred. It was a stack that could be carried in one hand if you needed to do it. At least that's the description I've heard.

And it is correct that that's the only case where documents were actually handed over to Plaintiff's lawyer in an individual smoking and



health case, as I recall, at least, prior to the date of this letter, April of 1995.

Q. Can you help me with this, sir? Can you tell me if you don't know the veracity of the statement made on April 21st, 1995 by coordinating counsel as to the entirety of personal injury individual cases brought from 1981 to April 1995 as set forth in this sentence is accurate or not, that it would fill less than one box?

A. You're referring now to all the documents -- I'm sorry?

Q. I'm referring to what coordinating counsel represented to the Plaintiff's lawyer in the last sentence of the first paragraph of exhibit 3.

A. I just don't know. We filed -- you know, we filed responses to Interrogatories in a lot of cases, but I have no idea what the volume would be. And I've -- I've explained the situation regarding documents produced.

MR. BERNICK: Just so we're clear, Mr. Motley, some of your earlier questions related to the -- the attachment to this letter which does talk about documents produced, whereas the statement that you've quoted at the early part of the letter where the witness is unclear on total volume goes beyond that and asks or -- or discusses transcripts -- basically, Pleadings, in addition to documents produced.

BY MR. MOTLEY:

Q. Brown & Williamson or someone on their behalf filed with Ms. Walburn that five pages were produced, sir, not five documents. Now, let me get back to my original question.

Are you the Kendrick Wells who testified in the case against Mr. Merrell Williams at page 53, line 23 through 25 as follows:

I've been involved in all document production in product litigation made by the company, and I've been personally involved in every product litigation production of documents.

Is that the same Kendrick Wells who just told me he doesn't remember how many pages were produced?

MR. BERNICK: You -- you don't have to answer that question. First, you made a prefatory statement, which is improper, not part of the question, and we'd move to strike that.

Second, you're now talking about his testimony about his involvement, which he gave, and he can -- he can certainly talk to it if you ask him a fair question. You've now wrapped into it a misstatement and a misrepresentation concerning the document that you've tendered to the witness and his testimony about it.

MR. MOTLEY: It's a misstatement and a misrepresentation made by a lawyer purportedly acting at your request, sir.

MR. BERNICK: The misstatement, Mr. Motley, is yours in your question. The document that you've tendered to the witness distinguishes between documents produced in prior cases -- there is a table that deals with that. The witness has discussed that -- and a statement that appears

elsewhere in the document in this covering letter which discusses not only documents produced but the volume of transcripts, the volume of requests for admissions, responses to Interrogatories, basically Pleadings.

And there the witness has been candid with you that it's hard for him to estimate precisely the total volume of Pleadings. Your question confuses all that and it's argumentative.

BY MR. MOTLEY:

Q. Well, I certainly don't want to confuse you, sir. Let me ask a simple question. If you indeed had been involved, your words, in all document production in product litigation made by the company -- and I've been personally involved in every product litigation production of documents, and I'm generally familiar with the other productions of documents made by the company in other litigation, and I had inquired of other lawyers who also knew about other productions of the company whether they knew of any such production, and they confirmed my own conclusions that none of these documents, referring to the Merrell Williams documents, had been produced in litigation by the company.

That deposition was taken in the case of Mr. Maddox versus Merrell Williams.

Now, sir, is that statement you made under oath in 1994 accurate or not?

MR. BERNICK: Now, you're -- now, I believe you're required to show the witness his prior testimony.

MR. MOTLEY: Let the record reflect at counsel's request, I'm handing to the witness and his counsel a copy of a transcript in Robert Maddox versus Merrell Williams. The date is September the 8th, 1994.

BY MR. MOTLEY:

Q. And I ask you to look at page 53, sir.  
(Tendered)

MR. BERNICK: 54? Oh, okay.

MR. MOTLEY: 53.

MR. BERNICK: It's basically 53, the last question there, and the answer that goes over to the following page.

MR. MOTLEY: Over to page 54.

MR. BERNICK: And your question to him is whether that's -- his testimony there is accurate?

MR. MOTLEY: That's correct, sir. I trust there's no confusion about that.

BY MR. MOTLEY:

Q. The answer to my question is what?

A. Sir, I have not --

Q. Is that correct or not, what he said?

A. I have not read it. Could you repeat the question?

Q. Yes, sir. Is your testimony that I've just shown you in what will be marked as exhibit 4, the deposition transcript in the Maddox versus Williams case, correct as I read it into the record previously?

MR. BERNICK: Well, the relying upon how you read it into the record, which I don't even remember at this point. I mean, just ask him whether

his testimony in the deposition at pages 53, line -- line 12 is the question, and the answer concludes at page 54, line 9.

The question to you, I think, Mr. Wells, is whether your testimony there was accurate. Is that fair?

MR. MOTLEY: He went to a better law school than me. Why don't you answer his question.

THE WITNESS: Do you accept his question?

MR. MOTLEY: Listen, he's good at rephrasing my questions; I've got to give him that.

THE WITNESS: The answer is yes.  
BY MR. MOTLEY:

Q. So you have been involved in all product -- all document production in product litigation made by the company, correct?

A. I had as of the time of that deposition.

Q. Okay. Well, as at the time of that deposition in 1994, had you -- can you tell us whether or not the totality of pages produced in document productions were five, less than five or more than five?

MR. BERNICK: Individual cases --

MR. MOTLEY: Individual cases.

MR. BERNICK: -- since 1981?

MR. MOTLEY: Since 1981.

THE WITNESS: It's more like about 5 to 800 pages.  
BY MR. MOTLEY:

Q. Okay. Can you tell me, sir, since you filed an affidavit in the Maddox matter that I will show you in a second, can you tell me amongst those 5 to 800 pages produced in personal injury individual litigation since 1981 to 1994, if amongst those documents were these minutes about which we started this discourse produced in any individual lawsuit from 1981 to 1994, and if so, which case?

A. Your question is -- well, rather than have me repeat the question, could you repeat it?

Q. Okay. Yes. You just told us that the statement in the letter, exhibit 3, by the lawyer in Minnesota to Ms. Walburn, the Plaintiff's lawyer, was inaccurate in that it says five pages of documents were produced. And I asked you to estimate for me how many you recall were produced, and you said between 5 and 800, I believe you just told me, correct?

A. That's right.

Q. Can you tell me if among those 5 to 800 pages of documents produced between 1981 and 1994 when you gave this deposition there was the minutes of the Vancouver, British Columbia scientific meeting in 1989?

A. That production occurred prior to the 1989 date of the Vancouver conference, so the answer must be no.

Q. After the 1989 conference, sir, how many pages of documents were produced by your company in individual litigation between 1989 and 1994 when you gave an affidavit, which I'm going to go into in a minute, and the deposition in the Maddox versus Williams case?

A. I don't recall any Brown & Williamson documents being turned over to plaintiffs in individual product litigation cases between the production in the Dewey case that's identified in the schedule here in the Minnesota letter and I think you said 1994.

Q. Can you tell me, sir, whether or not Brown & Williamson has placed into the Minnesota depository copies of those 5 to 800 pages of documents you -- you recall by estimate were produced in Dewey?

A. I'm sure they're in line to go in. But, you know, the total production going into that depository is millions of pages, and I don't know which end they started on. I don't know whether it's in there now or not.

Q. Can you tell me, sir --  
MR. MOTLEY: What? Yeah. Let me finish this line of questioning, please.

BY MR. MOTLEY:

Q. Can you tell me, sir, is it your testimony from 1989 to 1994, Brown & Williamson produced the sum total of zero pages of documents to persons involved in individual health litigation against your company?

A. My recollection, and if you have documents we turned over, I guess I'm wrong --

Q. Go ahead, sir.

A. Are you ready to go?

Q. Yes, sir.

A. My recollection is that no documents were given to Plaintiffs' lawyers in individual product litigation between 1989 and 1994 --

Q. Okay.

A. -- by Brown & Williamson.

Q. By Brown & Williamson. How many personal injury lawsuits were pending between 1989 and 1994, sir, estimate for me, which called for production of documents in individual cases?

MR. BERNICK: You're talking really about a pending document request in an individual case during that period of time?

MR. MOTLEY: Yes.

THE WITNESS: I would have to think about that one for a minute.

BY MR. MOTLEY:

Q. Take your time, sir.

MR. BERNICK: It's for you, Ron.

BY MR. MOTLEY:

Q. Are you ready?

MR. MOTLEY: My jury is back. They miss me.

MR. BERNICK: It might be more productive than the question that's pending for you.

MR. MOTLEY: May be.

THE WITNESS: Mr. Motley, the best I can do is no better than a guess.

BY MR. MOTLEY:

Q. That's fine.

A. But my guess to the best I can scrape my memory is less than a dozen.

Q. Less than a dozen. Now, are you familiar, sir, as an attorney -- and I'm sure you

are, but I need to ask this foundational question -- with a requirement under the rules of production, civil procedure, that document requests must be seasonally amended to reflect receipt of new documents that meet the scope of the request previously made?

MR. BERNICK: Which state are you referring to now?

MR. MOTLEY: Any state.

BY MR. MOTLEY:

Q. Any state that's got rules of civil procedure, sir, that you're familiar with do require that you supplement your responses when the information becomes available that's pertinent to the prior request, correct?

A. Yeah, I understand that question better.

Q. Okay.

A. I think that's the general rule.

Q. Okay. Do you know when the Dewey case was dismissed?

A. You're really testing my memory for numbers here.

Q. Best -- best estimate.

A. My best estimate is in, let's say -- in the late 1980s, the best I can remember.

MR. BERNICK: Is this a good time here?

MR. MOTLEY: One more question, and then we'll take a break. I know you want to take one. That's fine.

BY MR. MOTLEY:

Q. Sir, is it true that you reviewed the box of documents that have come to be called colloquially the Merrell Williams documents to ascertain whether or not they had previously been produced in product liability litigation of any kind by your company?

A. I went through the box. That question of review was probed at length by Mr. DeMoisey in my previous deposition almost to the point of, well, how many seconds did you spend with each page.

Q. I won't torture you like that.

A. And I -- I don't recall. But I did look through the box, and I did have assistance from -- in the form of information provided to me to assist me in making the determination that's reflected there in my testimony at that -- in that deposition.

Q. Well, did you review the box of documents and recognize each of those documents -- when I say the box of documents, I mean the Merrell Williams documents -- and did you recognize each of those documents as copies of documents which were selected by or under the supervision of lawyers as being documents relevant to that pending and threatened litigation for analysis by the Wyatt law firm?

MR. BERNICK: Did you get all that?

MR. MOTLEY: Well, these are his words.

THE WITNESS: No, I didn't.

MR. BERNICK: Well, then, why don't you show him.

MR. MOTLEY: I'll be glad to.

BY MR. MOTLEY:

Q. It's attached to your deposition. This will be number 5. This is your affidavit you filed, sir, in the Maddox versus Williams. And I was

reading from your own --

MR. BERNICK: You didn't attach it to the depositions you gave us here, so ...

MR. MOTLEY: No offense, and I apologize.

BY MR. MOTLEY:

Q. Down at the bottom is what I was reading to you.

A. I'm sorry, Mr. Motley, the question is whether --

Q. Did you do, in fact, what you said you did in your affidavit?

A. Well, excuse me. I appreciate you giving me the affidavit to see, and this refreshes my recollection, and the answer is, yes, I did.

Q. Okay. The final question before we break -- or it may end up being the final line of questions. I hope it's just one question, but one never knows when I pose questions -- can you tell me, Mr. Wells, do you now recollect that the documents that are contained in the Merrell Williams box of documents, that none of them had ever been produced in product liability litigation by Brown & Williamson?

A. My recollection of my conclusion having reviewed the documents is that none of them had been produced, given to Plaintiffs' lawyers in individual smoking and health cases.

Q. Had any of the documents been produced in any kind of litigation, whether by individuals, groups of people, the wildlife federation or anybody else, to your knowledge? Well, you keep -- you keep -- you fellows are very crafty at painting me in a corner, and now I want to broaden my horizon to the entire room and ask, sir, do you know whether the Merrell Williams documents have ever been produced by Brown & Williamson in any kind of litigation brought by anybody?

MR. BERNICK: At any time?

MR. MOTLEY: At any time.

MR. BERNICK: All the way up to the present day?

MR. MOTLEY: No, up to the time you crafted that date.

MR. BERNICK: So we're now October 20th, 1993, and you're asking him whether any of the Merrell Williams documents, as you have defined that term, have been produced previously in any kind of outstanding litigation?

MR. MOTLEY: Correct.

THE WITNESS: The answer is no.

MR. MOTLEY: Take a break, and -- we'll go off the record now.

THE VIDEOGRAPHER: We'll go off the record at 11:20 AM.

(PLF. EXH. 4, Deposition of J. Kendrick Wells, III taken on 9/8/94 in the matter of Robert L. Maddox, et al. v. Merrell Williams, was marked for identification.)

(PLF. EXH. 5, Affidavit of J. Kendrick Wells, III in the matter of Robert L. Maddox, et al. v. Merrell Williams, was

marked for identification.)  
(A recess transpired.)

THE VIDEOGRAPHER: We're back on the record, 11:37 AM.

MR. BERNICK: Mr. Wells wanted to correct a prior answer that he gave identifying some people in response to one of Mr. Motley's questions. Go ahead.

THE WITNESS: Mr. Motley, you had asked what lawyers counseled the specialty markets unit and sales department. And I didn't realize until you got into the questions that -- or didn't recall that it was an international sales unit, so I need to correct the lawyers who counseled that.

The lawyers who counseled specialty markets were Mike Hendershot and Tim Hazlitt, and Tony Burke as the general counsel may have been involved in counseling them. I'm not sure. Now, that would be up until the investigation began.

BY MR. MOTLEY:

Q. Mr. Wells, returning to the minutes of the Vancouver, British Columbia conference in 1989, can you tell me in which -- in which category of the master summary for B&W subjective product review, which you'll -- I'll mark as exhibit 6, the minutes would have been coded under, if you know?

I hand you exhibit 6, which we'll mark in a moment, and, of course, I'll substitute one without the little pretty purple flags on it.

MR. BERNICK: You have to excuse the delay, Mr. Motley. We have -- these don't have any markings or stamps on them or anything, and we have to go pull the corresponding copies so that we know what we're dealing with, all right?

MR. MOTLEY: Sure.

MR. BERNICK: Yeah, we've got an issue here.

MR. MOTLEY: Yes, sir.

MR. BERNICK: The issue, Mr. Motley, is this: This document corresponds only in part to the record that we have of the documents that were -- would be the subject of Judge Landrum's Order. The copy that we have stops after page 6, so I don't know that the terms of Judge Landrum's Order apply to the balance of the document.

What we can do is if you want to ask some questions about the document, to the extent that the witness can answer them from the face of the document up through page 6, we can do that now and then over the lunch hour, we'll try to find out where's the rest of the document.

MR. MOTLEY: Okay. That's fair. That's fair.

BY MR. MOTLEY:

Q. Let me ask you the general question, sir: Are you familiar with what is Plaintiff's Exhibit 6 or at least the first 6 pages of it?

A. I'm not currently familiar with this document. I don't recall being familiar with it. This is a document counsel used in making the collection of documents for litigation from the Brown & Williamson files. I did not ever work with this document.

Q. Okay. Let me mark as exhibit 7 the purported February 24th, 1988 taxonomy.

(PLF. EXH. 6, Master Summary for B&W Subjective Document Review as of March 31, 1989, was marked for identification.)

(PLF. EXH. 7, Definitions for the Brown & Williamson Subjective Coding Taxonomy updated 2/24/88, was marked for identification.)

MR. BERNICK: We haven't compared them page by page, but, again, this goes to 43 and that is different from what we have that was ruled out in Butler. So with that same caveat, if you want to ask him some questions about the pages up through 26 --

MR. MOTLEY: That's fine.

MR. BERNICK: -- then we can check out the rest of it.

MR. MOTLEY: That's fine.

BY MR. MOTLEY:

Q. Can you do that as amended, Mr. Wells,, tell me if you're familiar with number 7?

A. Mr. Motley, I'm not familiar with the contents.

Q. Sir, as someone who has signed from time to time, attested to the veracity of Interrogatories filed by your company in litigation, is it your testimony that you never utilized number 6 nor number 7 in searching for documents that might respond -- reasonably respond to requests for production of documents?

A. Mr. Motley, I rely on counsel for that, and I did not personally search for documents, nor did I use these two exhibits you have given me.

Q. Number 8 is entitled Chronology of Brown & Williamson Smoking and Health Research dated October 25th, 1988. This will be number 8.

(PLF. EXH. 8, Chronology of Brown & Williamson Smoking and Health Research, Revised Draft of 10/25/88, was marked for identification.)

MR. MOTLEY: And I don't have a clip for that so if you can help me, somebody brought a clip, that would be great. I've got a clip give me the unclipped while I have this up.

MR. BERNICK: They correspond. The question to him is is he familiar with it?

MR. MOTLEY: Uh-huh.

BY MR. MOTLEY:

Q. Are you familiar with that document, sir?

A. Mr. Motley, this appears to be a document prepared by counsel for Brown & Williamson, and I cannot precisely say that I have seen this document. I have seen a document something like this. It's a document that was prepared for reference for litigating cases. It's a document that I'm certain I just should have studied, but I never got around to it.

I have glanced -- glanced over it, and that's the extent of my familiarity.

Q. Is the document number 8 that's in front of you, the chronology, is that one of the documents that you looked at in ever how in-depth you might



have looked at it in preparation for the affidavit that we discussed earlier that you filed in the Maddox versus Williams case?

A. In the deposition that Mr. DeMoisey took, he asked me to estimate the number of pages. And there have been some wisecracks about my math, but there were a lot of pages. And it was years ago, and I don't recall whether this document was in that box just from memory.

Q. Well, counsel has some nice notebooks over there, and I don't know what they are, but he seems to be able to find these documents in them, and I would ask you, sir, do you know whether those notebooks contain documents that were retrieved from the so-called Merrell Williams box?

MR. BERNICK: Which documents, the documents we've got back here?

MR. MOTLEY: Yes, sir.

MR. BERNICK: I'll tell you what they are.

MR. MOTLEY: Okay.

MR. BERNICK: At least in part I can tell you what they are. They are a record of the documents that would be picked up by the scope of Judge Landrum's Order. So they are documents that were addressed in connection with this case and reviewed by the special master to be picked up by the terms of the order.

MR. MOTLEY: And then the Order then applies to the Merrell Williams' box; is that your understanding? All I'm trying to do is -- I want to make sure this document -- and maybe you can just tell me it is -- one of the ones that was fetched from Mr. Williams' box, the magic box.

MR. BERNICK: I just don't know. If you want, we can find out.

(This page contains information to be supplied by counsel and/or the deponent.)

MR. MOTLEY: I would like to know that because I would like to know if this is one of the documents that Mr. Wells testified to in 1994 were never produced in any litigation, product liability litigation, up to that time, like page 53 and 54 which we previously discussed. I would like to know that.

And he says right now he's not prepared to say that.

BY MR. MOTLEY:

Q. And I would like to know if indeed, Mr. Wells, the documents that the special master in the Butler case referred to include all the documents that were in Mr. Williams' box, then that, in fact, would be a document about which you opined that had never been produced in product liability litigation, correct, if my assumption is correct?

MR. BERNICK: You went right past me. You've got too many things there. Try me again. If this document is what?

BY MR. MOTLEY:

Q. If this document is part of the Merrell Williams' box, then would I be correct in assuming that that is a document which had never been produced in product liability litigation, as you opined in

your deposition that Mr. DeMoisey took in 1994?

MR. BERNICK: By Merrell Williams' box, you mean the box of documents that he reviewed in connection with his affidavit?

MR. MOTLEY: Yes. He being Mr. Wells.

THE WITNESS: And the answer is yes.

BY MR. MOTLEY:

Q. Now, do you know, sir, whether there is a revised more -- more recent draft of the chronology of Brown & Williamson smoking and health research that exists?

MR. BERNICK: You can answer that question yes or no.

THE WITNESS: I don't know.

BY MR. MOTLEY:

Q. Who would know; do you know?

A. Yes. Our office staff or counsel could determine that.

MR. MOTLEY: If counsel would consider advising me whether you are going to tell me or not, and if so, who would know, I would be grateful. And if you -- if you don't think that's proper, then, of course, we'll do whatever we deem appropriate.

BY MR. MOTLEY:

Q. I guess what I want to know, sir, do you know whether or not there is a document that you have personal knowledge of that recites in summary form documents relating to smoking and health research which would include the minutes of the Vancouver, British Columbia meeting which obviously postdates this draft?

MR. BERNICK: Maybe I should do this, Mr. Motley, make a suggestion.

MR. MOTLEY: Okay.

MR. BERNICK: If you're talking about documents that would be kind of a chronology for any purpose that might include the Vancouver minutes, there's -- there is no way to even begin to really identify what that means, because there are all kinds of documents and different chronologies and recitations. If you are asking, is there a revised draft of this particular document --

MR. MOTLEY: That's the first question.

MR. BERNICK: Well, I'm only going to -- I'm only going to go pursue one thing. But is that your question --

MR. MOTLEY: Let's start with that one.

MR. BERNICK: -- whether there is a revised version of this particular document?

MR. MOTLEY: Yes, sir.

MR. BERNICK: Okay, and now you're asking me to go find out whether that's true or not.

MR. MOTLEY: Well, I'm asking if you can -- if you feel it's appropriate to tell me that. You may decide it's not appropriate to tell me that.

MR. BERNICK: I may decide that. At least I understand what your question is.

MR. MOTLEY: That's it.

(This page contains information to be supplied by counsel and/or the deponent.)

BY MR. MOTLEY:

Q. And now that you mentioned that there may

be other chronologies, let me ask you this question, Mr. Wells.

MR. BERNICK: I didn't say that there might be. I'm saying that your question is so ambiguous that there are any number of things that somebody might consider a chronology.

BY MR. MOTLEY:

Q. In the pursuit of supposition, let me pursue this question, sir: Do you know whether or not there might exist a chronology of documents in the legal department or in any department at Brown & Williamson that would include reference to the minutes of the Vancouver, British Columbia 1989 meeting?

MR. BERNICK: Let me put my objection this way. If there is a revised version of this document --

MR. MOTLEY: No, no, no, no. I'm going broader.

MR. BERNICK: I understand. You're real broad. But particularly if it's in the legal department, in all likelihood, it is privileged, and then the content of that document is privileged, including whether it refers to the Vancouver minutes or something else. I don't know that this witness has any knowledge of that, but I'm going to instruct him not to answer because I do believe it calls for privileged information.

MR. MOTLEY: Well --

MR. BERNICK: This document is a document that we viewed, and we know that Judge Landrum has ruled the other way as a privileged document. His Order does not extend to any other documents other than the ones that were before him.

BY MR. MOTLEY:

Q. Mr. Wells, I guess what I'm getting at is I want you to tell me since you have brought up the existence of the minutes of the British Columbia meeting, inaccurate minutes as you've termed them, can you help me with this; and that is, do you know of any list, not an Irving Wallace type list, but any list or document that might make reference to the existence of the minutes of 1989 which is contemporaneous with the minutes being received by the legal department?

MR. BERNICK: We'll just strike the preparatory statement. It was you, I believe, Mr. Motley who raised the Vancouver minutes at the outset of your questions. To the extent that your question calls for documents produced in the ordinary course of business that would not be privileged documents that might contain a contemporaneous reference to the Vancouver minutes, you can answer that question.

THE WITNESS: I've forgotten the question. I'm sorry.

BY MR. MOTLEY:

Q. Well, I'm trying to find out if there's a document somewhere that makes reference to these minutes of the British Columbia meeting in 1989 that you know about.

Have you ever seen a document that says, Joe Jones has in his central desk drawer the minutes,

the inaccurate minutes, the original draft? Because you've already told me that you've seen them since Mr. Wigand's deposition.

MR. BERNICK: Again, to the extent that there's a document that was generated in the ordinary course of business, you can answer that question. To the extent that this calls for documents that are privileged documents prepared for litigation, I instruct you not to answer the question.

THE WITNESS: I can only recall one nonprivileged document, and it might refer to them, but I don't know.

BY MR. MOTLEY:

Q. Can you help me with a description so that I can pursue it after this deposition and not be told that I haven't prescribed it with the precision that's sometimes required?

A. Yes. It's a transmittal memo covering minutes that we sent out.

Q. After they were revised? After the inaccurate ones were revised?

A. Yes.

Q. And -- and if I describe it as you did, since you're in charge of production of documents, you'll be able to find it, correct?

A. I'm not now in charge of production of documents. I think I can describe it so that it can be found.

Q. Good.

A. Let me also say that it is not my assertion that the minutes are inaccurate. I wasn't at the meeting.

Q. Do you know whether any lawyers were at that meeting?

MR. BERNICK: The Vancouver meeting?

MR. MOTLEY: Uh-huh.

THE WITNESS: My recollection is that the minutes contain a recitation of people who attended, and I'd refer to that. I believe no lawyers from Brown & Williamson were there, but I don't recall.

BY MR. MOTLEY:

Q. Exhibit 8, the chronology, have you ever seen a document that has this style on it that's not missing pages? And I'm not suggesting that anybody took the pages out, because what I see is what I get, and this is all I have and there is pages missing in it.

MR. BERNICK: We'll see if our copy has got more pages. Do you want to give me an example? 27, 28. In our copy that we have here, there are some missing pages, as well. So I don't have one here -- right here for you, Counsel.

BY MR. MOTLEY:

Q. Well, can you help me, Mr. Wells? Do you know whether or not there exists in the files of Brown & Williamson a chronology document that is whole and complete and has all the pages in it?

A. I don't know.

Q. Do you know who would know?

A. Not without looking, but either the author of the document through counsel or -- well, he may not know what we have. I guess someone on our staff could look at the document and answer your

question if we still -- if we, in fact, received this particular document.

I'm certain only that we received final versions, and we may not have received -- well, that -- that came from -- that probably came from our files, didn't it? Okay. Yeah. That's the way it could be determined.

Q. Do you know who the author of that document is or the firm that authored that document?

A. It's either King & Spalding or Shook, Hardy & Bacon. My recollection is rusty, but I think it's King & Spalding.

Q. Do you know Mr. John Rupp? And that's a famous name here in Kentucky, I know, Rupp. Do you know Mr. John Rupp?

A. I do.

Q. And who is he?

A. John Rupp is a partner with Covington & Burling law firm.

Q. Have you learned whether or not he is under grand jury investigation?

MR. BERNICK: Again, to the extent that this calls for information, Mr. Wells, that you have received in the course of your activities as counsel to the company, you're instructed not to answer the question.

THE WITNESS: I have no information indicating that he is.

BY MR. MOTLEY:

Q. Has he represented Brown & Williamson in the past in any capacity? I don't -- I'm not asking the nature of the representation at this time, but just whether or not he, in fact, has.

MR. BERNICK: Has he done legal work for the company?

MR. MOTLEY: Yes.

THE WITNESS: John Rupp has certainly represented Brown & Williamson along with other companies in the industry. I don't recall whether he has represented Brown & Williamson exclusively in some manner.

BY MR. MOTLEY:

Q. Does the name additives panel mean anything to you? Or maybe additive guidance panel.

A. The phrase you began with, really, additives panel suggests some possibilities which I can't keep straight. Additives guidance panel suggests that it is a group that looks at additives, and I assume cigarette additives in this case, but -- but I'm not -- I can't identify it further without some more specifics.

Q. Well, have you ever served on any kind of group, be it ad hoc panel, committee, confederacy or whatever, which looked at additives that were contained in cigarettes?

A. That's helpful, thank you, because that makes the reference to Brown & Williamson. I am aware of our additives panel, and to my knowledge, I have never served as a member. I have rendered counsel to that group, and I think a couple of times I may have substituted for people who were members while they were unavailable, out of town, but I don't recall ever being a member of that group.

Q. The panel itself is comprised, I would take it, of scientists, people with scientific background?

A. That's correct.

Q. Your college degree is in what, Mr. Wells?

A. Government, U. S. Government.

Q. And the last time I was at law school, they didn't teach toxicology as a separate subject. Is that your experience at your law school?

A. It was. At least if they did, I wasn't in the course.

Q. I think it may be called the additives advisory board, maybe. Does that ring a bell?

MR. BERNICK: What's called the additives -- the one that he just referred to?

MR. MOTLEY: Yes, that's amorphous entity we've been trying to describe.

THE WITNESS: Brown & Williamson has had one continuing group, and I'm a little fuzzy on the name, I'm sorry.

BY MR. MOTLEY:

Q. That's all right.

A. If we're referring to the one additives advisory group at Brown & Williamson, I understand the -- I understand the context.

Q. And is that group, whatever name it might have, comprised of scientists?

A. Yes.

Q. Have you ever heard the name Healthy Buildings International?

A. Yes.

Q. Can you describe for me what you understand that organization to be?

A. Healthy Buildings International is a -- is a group that monitors the air inside of buildings, and they -- they work as a contractor. They do this on request, as I understand it, of the proprietor of a building who has some reason to want an analysis of the air inside the building. Healthy Buildings International is a business that is capable of coming in and analyzing the indoor air, and they -- that is their business.

Q. Has Brown & Williamson, to your knowledge, ever made a financial contribution of any kind to HBI?

A. Not to my knowledge.

Q. To your knowledge, sir -- and here I'm soliciting rank hearsay, which I'm entitled to do in a discovery deposition -- have you heard whether or not Phillip Morris has made contributions to HBI?

MR. BERNICK: If you've heard that information in the context of whether -- I don't know whether you have, but any kind of information in that regard that you've heard, don't answer the question to the extent that it calls for privileged information that you have received in the ordinary course of your duties as counsel to B&W or in connection with joint defense efforts involving other manufacturers.

If you have some independent source of knowledge in that area, you can answer the question.

THE WITNESS: I do not have an

independent source of knowledge except what's been in the newspapers, and I do not know whether that's correct.

BY MR. MOTLEY:

Q. What is the Tobacco Institute?

A. The Tobacco Institute is a trade association of the tobacco manufacturing industry.

Q. Of which Brown & Williamson is a member?

A. We are a member at this time.

Q. And you make financial contributions for the support of that organization --

A. Yes.

Q. -- in some fashion?

A. Yes, we do.

Q. Can you tell me, sir, have you ever served on any committees at the Tobacco Institute?

A. Yes, I have.

Q. Do you currently so serve?

A. I serve as second chair.

Q. Is that like vice president, maybe?

A. At a bank.

Q. At a bank. So more -- more than one chair there, second chair?

A. The general counsel -- I serve on the committee council. That is a group of general counsel of companies, and I attend the meetings regularly as a second to the general counsel.

Q. To your knowledge, sir, has the Tobacco Institute provided financial assistance to Healthy Buildings International?

A. I've heard that the Tobacco Institute --

MR. BERNICK: Get cautioned that to the extent that you've got any kind of information in this area in connection with joint defense meetings or other privileged communications, you're instructed not to answer. To the extent that you've obtained the information from other sources, you may answer.

THE WITNESS: Thank you for that instruction, and I have to think about this for a minute.

I'm not aware of any financial contributions by the Tobacco Institute to Healthy Buildings International, as I understand the use of the term contributions, that is, other than payment for services.

BY MR. MOTLEY:

Q. Excuse me.

MR. MOTLEY: This will be number 9.

(PLF. EXH. 9, Document entitled Environmental Tobacco Smoke Investigation dated 12/20/94, was marked for identification.)

BY MR. MOTLEY:

Q. Before I ask you to look at that, let me ask a foundational question, sir. In addition -- excuse me. Strike that. Do you know whether a company called Owens Corning Fiberglas is a member of the Healthy Buildings International?

A. I do not.

Q. Okay. If you'd kindly look at number 9 for me.

MR. BERNICK: It will take us a minute again here. Go ahead and look at it. Do you have

another copy of this?

MR. MOTLEY: Well, I have the -- what I have is -- is a copy as reported in Mr. Daynard's journal, peer review journal.

MR. BERNICK: Let the record reflect that Mr. Motley smiled when he said that in a very candid gesture.

MR. MOTLEY: Reviewed by fellow travelers, peers of his.

THE WITNESS: Do I need to read the whole document?

BY MR. MOTLEY:

Q. No, sir, I'm going to direct you to -- just a second.

MR. MOTLEY: Might I pose a foundational question?

MR. BERNICK: Sure.

BY MR. MOTLEY:

Q. Mr. Wells, have you seen in any capacity the staff report? I'm not asking your opinion about it, but have you seen it in your capacity as an employee of Brown & Williamson, exhibit 9?

A. I don't recall. Some -- I'm aware that it was issued by the Waxman committee and someone may have sent it to me, but I did not read it.

Q. Had you received it -- do you know whether you would have received it as the, quote, second chair for Brown & Williamson on any Tobacco Institute committees?

A. I don't know.

Q. Are you familiar, generally, sir, with the allegation in the subcommittee's report that the Healthy Buildings International organization was funded by the Tobacco Institute? Are you familiar with that allegation that was made by the subcommittee?

A. What does funded mean? Is it the same as contribution?

Q. Yeah, giving money in any fashion, under the table, over the table?

A. Including payment for services?

Q. Yes, sir.

A. Those aren't the allegation -- that's not the allegation I recall, but then I don't recall whether that allegation has been around or not.

Q. On the second page, I believe, of exhibit 9, it may be the third page, under paragraph III entitled The HBI Concept, it is alleged in the second paragraph, and I quote:

During this period, after 1985, the Tobacco Institute, Phillip Morris, R. J. Reynolds Tobacco Company and the Center for Indoor Air Research (a tobacco industry research organization) paid HBI millions of dollars for its services.

Do you recall prior to today having been informed of such allegation?

A. I'm sorry, Mr. Motley, I'm lost. I haven't located it yet.

Q. It's under paragraph III, Roman numeral III, The HBI Concept.

A. On page?

Q. Well, see, my pages are different from yours. That's why I can't help you with the pages.



MR. BERNICK: All right. We've got it here.

THE WITNESS: Okay.

BY MR. MOTLEY:

Q. The second paragraph under page -- paragraph III.

A. I may have heard it. I know there's been a number of newspaper articles. I just didn't -- didn't recall it until I saw this document.

Q. Can you tell me, sir, whether or not it is true, at least to the extent of the Tobacco Institute, that they paid HBI sums of money for its services?

A. Yes.

Q. And the Center for Indoor Air Research, are you familiar with that?

A. I know roughly what it is.

Q. Roughly tell me.

A. Well, it's a group that accepts contributions from its members and funds research done independently of those members on the subject of environmental tobacco smoke. That's my understanding.

Q. Is the Tobacco Institute among the members of the CIAR?

A. I don't know.

Q. Same question, Brown & Williamson.

A. Brown & Williamson may have joined within the last few months. I'm not sure. But I know that prior to that time, Brown & Williamson was not a member.

Q. Are you familiar with a lawsuit that was brought by a gentleman named Seckler against the Healthy -- Healthy Buildings Institute?

A. I recall reading something about that in a newspaper article?

Q. Can you tell me whether or not Brown & Williamson has contributed any sum of money to the defense of the lawsuit by Mr. Seckler against HBI?

A. Not to my knowledge.

Q. Same question, Tobacco Institute.

A. I don't know.

Q. Might there be someone in the legal department of Brown & Williamson who would be more familiar with that issue, the issue of the Seckler lawsuit, than you are currently today?

A. As to the issue of the Seckler lawsuit and any payment from Brown & Williamson, our accounting people would be the best source for facts that go beyond my knowledge.

Q. Who would be the head of the accounting department?

A. The law department at Brown & Williamson has a small accounting unit, and Mr. Ben Shivly is the head.

Q. Okay. Does Brown & Williamson receive periodically documents which refer to expenditures by the Tobacco Institute for various matters, including payment of another party's, i.e., HBI's, legal expenses?

A. I don't know.

Q. Who would know that, the accounting

department?

A. I think the person most likely to know that would be Ernest Pepples.

Q. Are you familiar generally and broadly with the allegations made by Congressman Waxman regarding allegedly false reports being filed by the Healthy Building International with various government agencies, including OSHA?

A. I'm aware that Congressman Waxman has made such allegations, but your question really contains about the extent of my information.

MR. BERNICK: By that you mean that all you know is the claim?

THE WITNESS: That's -- all I know is that the claims were made.

BY MR. MOTLEY:

Q. Can you tell me whether the committee on which you sit of the Tobacco Institute has conducted any investigation or authorized any investigation into the allegations made in exhibit 9, the staff report of Congressman Waxman's subcommittee?

MR. BERNICK: You're now talking about the Brown & Williamson internal --

MR. MOTLEY: No, sir, I was talking about the committee he sits on.

THE WITNESS: The committee of counsel.

MR. MOTLEY: The second chair committee the committee of counsel, C-O-U-N-S-E-L --

MR. BERNICK: Has made any concerted -- has made any.

MR. MOTLEY: -- has authorized the payment of funds for an investigation into the allegations or themselves conducted an investigation into Congressman Waxman's allegations?

MR. BERNICK: At this point -- I'm sorry. Go ahead.

MR. BIERSTEKER: I was going to object to that question to the extent that it might call for information that's privileged under the joint defense doctrine we discussed earlier. I don't know what the source of any information that Mr. Wells might have on the subject is, but this is an area where we may be treading close to -- to privileged matters.

MR. BERNICK: Yeah. If you've got any information, Mr. Wells, that came to you in connection with your activities in connection with the committee of counsel, that that information -- on that particular subject in response to that question, that information is privileged, and you're instructed not to answer the question.

If you have an independent source of information on that subject, you can answer the question; or if you simply don't know, you can answer the question.

THE WITNESS: I don't know. I'm not aware of any investigation that's responsive to your question.

BY MR. MOTLEY:

Q. You don't know of it independent of privileged information, or you don't know of it period?

A. I don't know.

Q. Period?

A. Period.

Q. Now, let me see if my dense brain can understand this, and then we'll break for lunch per our previous agreement.

To some extent unknown to me, Brown & Williamson makes financial contributions to the Tobacco Institute, correct?

A. Yes.

Q. The Tobacco Institute has an annual budget, correct?

A. I've seen it until -- occasionally over the years. I assume they do, yes.

Q. And the Tobacco Institute must give an accounting to the people who make contributions from time to time about what they do with their money, right? Just like a church reports to the members. Maybe not quite like that, but in a similar business fashion.

A. They tell us as much as my church does. They -- they report. I don't know -- I don't know whether the information really reaches the level that I think of as an accounting.

Q. Okay. Well, can you help me with this: Do you know whether or not they report broad categories of expenditures such as legal fees?

A. I don't know the current practice.

Q. Are you familiar with special project 4?

A. Could you be more specific?

Q. You're familiar with the Council For Tobacco Research?

A. I know what it is.

Q. And Brown & Williamson is a member, sponsoring member, of that, has been from its inception when it had a different name, correct?

A. Yes, that's correct.

Q. Are you familiar, sir, with an opinion by Judge Lee Sarokin in the Haynes versus Liggett group case pending in the district court of New Jersey in which he discusses special account 4? Excuse me, not special project 4, special account 4. I'm getting that mixed with special projects 8.

MR. BERNICK: The question is whether he's familiar with the opinion and the discussion --

MR. MOTLEY: The opinion.

BY MR. MOTLEY:

Q. Have you ever read that opinion? You must have had a burning interest in it at one time, perhaps.

MR. BERNICK: Object to the form of the question.

THE WITNESS: I have read Judge Sarokin's opinions. I read them contemporaneous with their issue, and I can't recall much of any of them.

BY MR. MOTLEY:

Q. Well, you're a member -- your company is a member of the Council For Tobacco Research, right?

A. That's correct.

Q. They have a committee similar to the committee of counsel of the Tobacco Institute, don't they, comprised of counsel-- in-house counsel of the various constituent members, correct?

A. Not to my knowledge.

Q. They don't?

A. Not to my knowledge.

Q. You've never been -- have you ever been to a Council For Tobacco Research meeting?

A. I never have.

Q. Who in the legal department --

A. Excuse me, that's not correct. I went to a meeting, maybe one meeting, perhaps a decade ago.

Q. In the mid 1980s, approximately?

A. Roughly.

Q. Do you know whether any other lawyers, particularly Mr. Pepples, attended meetings on a regular basis of the Council For Tobacco Research?

A. Mr. Pepples does regularly attend meetings at the Council For Tobacco Research.

Q. Do you know whether the law department receives minutes of meetings of the Council For Tobacco Research which Mr. Pepples might have attended?

A. I don't know.

Q. When you reviewed Judge Sarokin's opinion in regard to special account number 4, special project number 8, did it interest you that he placed in that opinion -- and I'll be glad to show it to you -- excerpts from documents relating to the Council For Tobacco Research? Were you interested in that?

MR. BERNICK: At this point I'm going to object. I believe Mr. Wells reviewed that opinion in connection with his duties and responsibilities in the litigation area. I think that further testimony would show that, and whatever impressions he may have formed as a result of reviewing that opinion would be attorney work product and would be privileged. Therefore, I instruct him not to answer the question. Whether he's interested or not calls, in the case of this witness, for a legal impression, and I instruct him not to answer.

BY MR. MOTLEY:

Q. As a lawyer, sir, do -- are you familiar with the term Crime Fraud Exception to the Rule of Privileged and Work Product?

MR. BERNICK: I think you asked him that question this morning, but go ahead.

THE WITNESS: I don't consider myself an expert. I know generally about it.

BY MR. MOTLEY:

Q. What do you understand generally it to mean?

MR. BERNICK: Well, I think I'll allow the witness to answer that as a general principle, and testimony that I can permit in this area is very, very limited. You can describe in general concept what that means, but you are not to get into any analysis that you have heard of that exception, any application of that exception as being privileged. I don't know if that helps you an awful lot, but that permits you to testify to a very general characterization of what the exception is.

THE WITNESS: The objection is to specific application?

MR. BERNICK: Specific application or specific analysis of what the requirements for Crime Fraud are.

THE WITNESS: My understanding of the legal concept of Crime Fraud is that it is a doctrine that can apply in the course of discovery, and it begins with discovery and litigation under the civil rules in which one side asks another to produce documents, and the responding party, if it has documents it believes are privileged, reports that in the form of a privileged log, and the requesting party may then attack the assertion of privilege by claiming that the privilege is asserted, essentially, to cover fraud in which lawyers participated in the -- and connected with the assertion of privilege.  
BY MR. MOTLEY:

Q. Is it -- this is the last question before lunch. Is it not true, sir, that Brown & Williamson has documents in its files which relate to special account 4 and have been categorized as significant documents because of lawyer involvement with scientists?

MR. BERNICK: At this point, Mr. Motley, you're -- you're just reviewing, as I see it, from one of the prior exhibits, which is one of the taxonomies. If you're going to review -- ask questions from that exhibit, in light of Judge Landrum's Order, I want to have the witness take a look at the exhibit and have that in front of him so he can answer your questions.

However, your question just now goes beyond the document and asks for whether -- how that document and how that taxonomy has been applied.

MR. MOTLEY: No, sir.

MR. BERNICK: If it's not, then I misunderstand your question. I think that that would call for privileged information.

MR. MOTLEY: Let's start over again.

MR. BERNICK: I thought we were going to get real close to lunch here.

MR. MOTLEY: I am I know, but I'm getting -- catching a slight second wind here, and indulge me while I get done with this.

BY MR. MOTLEY:

Q. Sir, I'm not asking you to interpret the taxonomy or to offer an opinion about how it came into existence. I merely want to ask you this:

Didn't you tell me earlier and didn't you testify in the Maddox versus Williams case and didn't you opine in your affidavit in that case, previous to your deposition, all three things in the conjunctive, that documents were turned over to outside law firms for the purpose of coding and summarizing and indexing those documents; and further, that Plaintiff's Exhibit Number 6, master summary, which we talked about earlier, is a result of the fruits of that labor?

MR. BERNICK: You've now asked a question that has got about 7 or 8 or 9 different parts. I would love to be able to have the witness respond to your question in a way that it's clear and fair. If there's something particular that you want to ask him about that document or about the document analysis that was done at the request of Brown & Williamson, I'd like to hear the question so that we can deal with it.

MR. MOTLEY: Well, let's break it down now.

BY MR. MOTLEY:

Q. Is it not true that outside counsel received documents, copies of documents, from Brown & Williamson and were tasked with the mission of, among other things, preparing indices and codes?

A. Outside documents came into Brown & Williamson's files, and we took the documents from the files and made copies and then proceeded to do the things that lawyers do when they are getting ready to deal with large production demands.

MR. BERNICK: I think when you spoke, Kendrick, you used outside documents. I think you meant outside counsel.

THE WITNESS: Oh, I'm sorry.

MR. BERNICK: Did you hear it the same way I did?

MR. MOTLEY: I heard that. I was struck by that too.

THE WITNESS: Outside counsel.

BY MR. MOTLEY:

Q. Well, documents somehow made their way into the files of Brown & Williamson, and documents were turned over to outside counsel, and among other things, this master summary was prepared, correct?

A. I have trouble recalling the master summary as something that I'm familiar with.

MR. BERNICK: Do you want to -- do we have an earlier version of that, or do you have something --

BY MR. MOTLEY:

Q. All I'm trying to do, Mr. Wells -- I promise you it's not a trick question. I'm seldom capable of perpetrating tricks in questions. But I want to find out, sir, if -- if your lawyers prepared on page 43 of the master summary a reference -- a reference to documents called account 4, would that not perforce demonstrate that you had documents in your files that you turned over to counsel that had some relevance to account 4, special account 4?

MR. BERNICK: I'm going to hold you up because this is part of the document that I don't know was covered by Judge Landrum's Order, remember?

MR. MOTLEY: Are you saying the pages, that you may not go back that far?

MR. BERNICK: Yeah. This says March 31, '89. Just give us a minute.

MR. MOTLEY: Counsel, over lunch while you're discussing that, I would ask you to rereview your interpretation of Judge Landrum's Order because the order refers to what was on the Internet, and the document in your hand in its complete form is in the -- on the Internet. The special master's findings which were affirmed so concluded, at least in part.

MR. BERNICK: Judge Landrum's Order --

MR. MOTLEY: Why don't you just look at it over lunch. No use us debating it right now. We'll stop right -- we'll stop right now and see if we can reduce the size of that mountain which just sprung from this mole hill and maybe get an answer to that simple question.

MR. BERNICK: Okay. Sounds good.

THE VIDEOGRAPHER: We'll go off the record at 12:37 PM.

(A luncheon recess transpired.)

(The following proceedings transpired off the video record.)

MR. MOTLEY: We have reviewed the judge's order, and we do not obviously agree with one another. Sometimes believe it or not we do agree with your construction of the order. I don't know if you've had an opportunity to look at the order.

MR. BERNICK: Here is my problem. Wasn't there another summary that was under one of these things that was another exhibit? There we go. That was the chronology and then there was the third one.

As I look at the order, on the second page, the top paragraph refers to -- makes a finding as to the documents at issue, and I take it the documents at issue to be the documents that were submitted to the Court.

MR. MOTLEY: Well, therein lies the rub.

MR. BERNICK: Take a look at the next paragraph; it is even clearer. It says:

It is further ordered Brown & Williamson is directed to produce to the Plaintiffs all documents which were submitted to this Court for in camera review and which were the subject of the special master's review and which are found in the UCSF library.

So we have a situation where the order applies to those documents submitted to the Court and the ones that were reviewed by the special master and are in the UCSF library. If there is something that happens to be in the UCSF library that wasn't submitted to the Court, that's number one.

Number two, just because you find something on the Internet, who knows who could be putting something on the Internet. My impression is the Internet grows as the months go by with new documents.

I don't believe the judge intended to have a rolling scope to his order if something gets picked up on the Internet. So I've got a bunch of problems with documents that were not submitted in the Butler case but happened to end up in the UCSF library.

With all that said, I don't know the case of the particular documents you have asked the witness about, whether this witness even knows very much about them, so I don't know how material it is to this examination. I don't know that there is some big deal that we've got to decide right now. I'm concerned about the scope of the order, and I want to put that on the record, as well.

MR. MOTLEY: You are aware, of course, that we submitted a set of the UCSF documents to the Court, and we can clearly find out whether the UCSF documents -- it's not my intention to make the claim that there is a rolling provision to this order that when any person puts something on the Internet with the likes of Brown & Williamson that that automatically comes in under the order, but since we are talking about, quote, the Merrell Williams

collection, it's clear to me that anything that was on the UCSF is on the UCSF -- in the UCSF collection is covered by the order.

I guess we need to find out whether the UCSF version of these three summaries includes all the pages that I have presented to the witness, and once we get off that hurdle, then we can argue about whether you are right or I am right or let the judge decide or come to compromise that we all can live with.

But at this point in time, I don't know that I'm -- today, I don't know that I'm going to get into in any great detail those pages about which there is a dispute.

MR. BERNICK: Also, I'm going to have to call the folks who were involved in the motion practice on this order, so I want to make sure that I understand.

MR. MOTLEY: Right. You are a fortunate man not having been involved with that matter, the long tortuous past.

(Off-the-record conference.)

(The following proceedings transpired on the video and stenographic records.)

THE VIDEOGRAPHER: We're back on the record at 2:18 PM.

BY MR. MOTLEY:

Q. Mr. Wells, I know you've been over here having a good time with me and your colleagues, but have you learned whether or not any person retained -- particularly Mr. Scanlon -- retained by Brown & Williamson in regard to Mr. Wigand are now the subjects of a grand jury investigation for an attempt to intimidate a federal witness?

A. I have no information that indicates there are.

Q. Who is Bob Northrip?

A. Bob Northrip is a lawyer who's been previously identified in this session as a partner for Shook, Hardy & Bacon.

Q. Is he present?

A. Yes, he is.

Q. Who is Jim Newsom?

A. Jim Newsom is a partner at Shook, Hardy & Bacon.

Q. For the record, who is Mr. Bill Shinn, S-H-I-N-N?

A. Bill Shinn was a partner with Shook, Hardy & Bacon. I'm not sure of his current status.

Q. Are you familiar with the word CORESTA, C-O-R-E-S-T-A?

A. Yes.

Q. What is CORESTA?

A. CORESTA is an organization of representatives from a number of different businesses. It includes representatives from European tobacco companies, I think primarily in what used to be western Europe. It includes other industries, as well. It includes paper companies, and I have a recollection that there are one or two additional industries who send representatives, and I can't recall.

Q. Is CORESTA an acronym for anything, to



your knowledge?

A. It may be, but I don't recall.

Q. The paper companies and others who are not directly involved in the tobacco business, are they suppliers of materials to tobacco companies?

MR. BERNICK: You mean, does Brown & Williamson buy paper from paper companies?

MR. MOTLEY: No. I'm asking him --

BY MR. MOTLEY:

Q. Well, let's cut to the chase of this. Is CORESTA composed of people who have a business interest in the tobacco industry? In other words, I wouldn't think you would have a plywood company as a member of CORESTA, would you?

A. My understanding is that that's correct. Since I can't remember all the members, I -- I would have to say that by and large, it is the tobacco company and its suppliers. That's a generic term. It does not mean that all tobacco companies buy from all of the suppliers.

Q. Does CORESTA as an entity engage in scientific research?

A. CORESTA is an interesting organization. It's very loose. Its staff the last time I inquired was one person, who is a secretary. It -- these representatives, I neglected to say, are scientists; and they have a structure which is a series of committees, and those committees meet and talk about whether there is some research to do.

CORESTA's traditional role has been to inquire -- conduct inquiry into the development of standards. And if they have a committee meeting and decide that some research would be appropriate, then, as I understand it, really CORESTA doesn't do it, but one or more of the representatives may volunteer to go back to their company and do it there and then bring the results back later.

Q. I take it B&W is a member of CORESTA?

A. I'm not sure. We send -- we do send a representative. I'm not certain we're a member. It could be that British American Tobacco is a member, and we go as second or perhaps we are a member. I'm not sure.

Q. Do you know who this person is that comprises the staff, this elite staff of one?

A. He's in France, but I don't know him. No, I can't recall his name.

Q. Do you know whether or not -- excuse me. Strike that.

Do you know the name of any scientists employed by B&W who may have attended CORESTA meetings?

A. Yes.

Q. Would you share that with me, please?

A. Yes. Would you like the ones I can recall?

Q. Yes, sir. Yes, sir.

A. All right. Tilford Riehl.

Q. How do you spell that, sir?

A. I'm sorry. T-I-L-F-O-R-D, R-I-E-H-L. Hugh Honeycutt, Roger Black. In terms of current employees, that's -- those are the only ones I can recall. If you want to include their so-called board

meetings, then I would include Earl Kohnhorst. I don't know whether he is attending or in a operating scientific group or not. Those are the current employees, to my knowledge.

Q. Have you ever attended a meeting of CORESTA?

A. No, sir.

Q. Have you ever engaged in reviewing papers generated by CORESTA of a scientific nature?

A. Brown & Williamson's R&D department has sent me from time to time materials from CORESTA to look at. I don't recall right now, without -- well, I don't recall any specific documents, so I -- I don't know whether they would fall into what you think of as scientific or not.

If you think anything from that organization is scientific, I have -- I have reviewed some of those documents at the request of the R&D department.

Q. Sir, did Shook, Hardy & Bacon provide precirculation of research, scientific research, review of documents for industry associations and CORESTA, to your knowledge?

MR. BERNICK: I'm sorry, prescientific review of documents, industry associations and CORESTA; I don't understand what the focus of the question is.

BY MR. MOTLEY:

Q. Well, sir, have you ever written a memo in which you stated, both firms, referring to Shook, Hardy & Bacon, the other firm being Lovell, White & Durrant or Durrant in London, currently provide precirculation review of documents for industry associations and would do a prompt and effective job for CORESTA?

MR. BERNICK: I don't know what document it is that you're reading from, Counsel?

MR. MOTLEY: I'm reading from my notes and I'm asking him if he remembers ever writing such a thing as that.

THE WITNESS: I may have. I -- I think that the statement is correct, although I'm not sure about the present tense.

BY MR. MOTLEY:

Q. Well, in 1993, February?

A. Well, I don't recall even then. That statement does not say scientific research. And I believe that statement would not be correct if -- if pertaining to scientific research.

Q. What do you understand to be the scope of Shook, Hardy's function in regard to precirculation review of documents for industry associations? Do you have any reference to what industry associations that might be?

A. Yes. Yes. The one that I know of would be the Tobacco Institute, and Shook, Hardy for some period of time reviewed documents at the request of the Tobacco Institute which had been written for public relations purposes.

Q. Did Shook, Hardy likewise review documents generated by the Council For Tobacco Research at the request of Brown & Williamson among others?

MR. BERNICK: Now, it would be helpful if you'd be a little bit more specific in what the question pertains to.

MR. MOTLEY: Any kind of documents.

MR. BERNICK: Any kind of documents ever written by the Center For Tobacco Research, did Shook, Hardy circulate them?

MR. MOTLEY: No, sir, I didn't say that.

MR. BERNICK: I'm sorry. I misunderstood.

BY MR. MOTLEY:

Q. That's okay. It's the Council For Tobacco Research, isn't it, C-O-U-N-C-I-L?

A. That's correct.

Q. Did Shook, Hardy & Bacon at any time prior to February 10th, 1993 undertake a review of documents generated by or at the request of the Council For Tobacco Research prior to their being circulated to the members of that organization?

A. I don't know.

Q. The same question: To your knowledge, did the Council For Tobacco Research give to Shook, Hardy & Bacon for precirculation review any scientific papers prior to their being published in the medical literature?

A. Not that I am aware of.

(PLF. EXH. 10, Memorandum from J. K. Wells to R. R. Black dated 2/10/93, was marked for identification.)  
(Off-the-record conference.)

MR. BERNICK: Counsel, I have no indication that this is either a UCSF document or was involved in the Butler case.

MR. MOTLEY: I never said it was.

MR. BERNICK: Do you want to explain to us how you obtained this?

MR. MOTLEY: No, sir. I'm not required to, sir.

MR. BERNICK: Nobody is required to do anything.

MR. MOTLEY: I know. This is Mississippi. I say that with great respect.

THE WITNESS: An island of Mississippi.

MR. MOTLEY: Can you -- do you want me to wait before I ask him to identify his signature or his initials, sir?

MR. BERNICK: You can have him identify his signature.

MR. MOTLEY: Okay.

BY MR. MOTLEY:

Q. Is that your initials, sir, over the document identified as Plaintiff's Exhibit 10?

A. That's correct.

Q. Are you familiar with that document, sir?

A. I'm familiar with it now that I have read it. I -- I don't recall it precisely. I have a vague recollection of writing something like that.

Q. Have you a recollection, sir, of writing other documents where you made reference to the utilization of Shook, Hardy & Bacon as a reviewer of scientific papers prior to their circulation to others in the corporation of B&W?

MR. BERNICK: Object. Object. Object to

the form of the question. Assumes facts not in evidence.

THE WITNESS: The premise of the question is one I can't accept because you haven't yet identified an instance where I recommended them for a review of scientific documents.

BY MR. MOTLEY:

Q. I'm just asking you if you have a recollection of ever having done so.

A. Mr. Motley, I've been recommending Shook, Hardy & Bacon to people for legal work for a long time. Just -- it's not possible to answer that question without a specific instance.

Q. I'm talking about reviewing content of scientific research to determine whether or not there's anything in the paper which contains the research which would adversely impact upon Brown -- B&W's legal position in product liability lawsuits.

MR. BERNICK: Just so I understand, recommending Shook, Hardy for purposes of doing a review of scientific papers to determine their litigation impact?

MR. MOTLEY: Correct.

MR. BERNICK: Has he recommended Shook, Hardy for that purpose?

MR. MOTLEY: Yes, sir, that's what I'm asking.

MR. BERNICK: You can respond to the yes or no on the recommendation, but -- you can answer that question yes or no.

THE WITNESS: I've done a lot of recommending of Shook, Hardy to do legal work over the years, and I've done a lot of -- done a good bit of in-house suggestion of the procedures that might be adopted, like hiring lawyers. I'm not sure what you mean by the term recommend, but I never -- I do not recall any instance where Shook, Hardy & Bacon was employed to review scientific research in smoking and health prior to its release for -- release by the author for publication.

BY MR. MOTLEY:

Q. Are you familiar, sir, with an organization called ACVA Atlantic, Inc., A-C-V-A?

MR. NORTHRIP: Would you repeat that, please?

MR. MOTLEY: ACVA, A-C-V-A, Atlantic, Incorporated.

THE WITNESS: I have seen that name somewhere. Is that -- is it in any way connected with HBI?

BY MR. MOTLEY:

Q. I -- I have reason to believe, yes, sir, that it is.

A. I've seen that name only in an article I read about the HBI investigation, and I have no knowledge of the organization other than that.

Q. Were you employed in the office of the general counsel or the law department of Brown & Williamson on July 8th, 1985?

A. I was in the Brown & Williamson law department in 1985. I've never held the office of general counsel.

Q. No, I don't mean that you held the

office. I meant as a -- as an entity within B&W, were you employed as a lawyer in a capacity in the law department July 8th, 1985?

A. Yes.

Q. And who was Mr. Ernest Pepples at that time?

A. Mr. Pepples was, I think, the general counsel.

Q. For Brown & Williamson?

A. Yes.

Q. And a senior vice president in 1985?

A. To the best of my knowledge, that's correct.

Q. Had you prior to July 8th, 1985 ever heard the term special projects CTR?

A. Prior to that date in 1985?

Q. Prior to that date -- any time prior to 1985 and after 1972 when you joined Brown & Williamson, if I have my dates correctly when you joined, and I think I do.

A. I don't recall.

Q. Did you write an article about legal ethics in 1969 when you worked with Wyatt, Combs?

A. I did.

(PLF. EXH. 11, Letter from Ernie Pepples to Donald K. Hoel dated 7/8/85, was marked for identification.)

BY MR. MOTLEY:

Q. I'm handing you exhibit 11. I don't know that I have another copy.

MR. MOTLEY: I think you will find that amongst the collection --

MR. BERNICK: Thank you.

MR. MOTLEY: -- of at least UCSF.

MR. BERNICK: Fire away.

BY MR. MOTLEY:

Q. Mr. Wells, have you seen document number 11 prior to today to your current recollection?

A. Not to my knowledge.

Q. Can you -- if we -- if you assume with me that this was amongst the Merrell Williams' collection, that would have been a document that you reviewed according to your affidavit of 1993 in the Maddox versus Williams case, would it not?

A. Let's take that hypothetical --

Q. Assume the truth of what I said, that that, in fact, was in the Merrell Williams' box.

THE WITNESS: All right.

MR. BERNICK: What's the question?

BY MR. MOTLEY:

Q. Assuming that it came from Merrell Williams' box, that's a document you would have reviewed according to your affidavit filed in Maddox versus Williams, correct?

A. I think we have just been through what I talked about by going through the box prior to my affidavit.

Q. I'm not asking -- I'm not suggesting, sir, that you read every word or committed it to memory, but you did file a court pleading in which you said none of those documents -- you have been able affirmatively to ascertain that none of the documents in the Merrell Williams' box had ever been

provided to any plaintiff in any smoking and health litigation; we went over that this morning, correct?

A. I didn't catch the last part of your question.

Q. You had -- you affirmed under oath that upon your review of the contents of the Merrell Williams' box, you were able to state positively that none of those documents in that box, including that one, assuming it came from the box, had ever been provided to any plaintiff's lawyer in any smoking and health litigation up to the time you filed that affidavit?

A. I did say that, and I still believe it to be correct.

Q. Okay. Now, do you see handwriting at the top right corner of that document?

A. I do.

Q. Since you testified under oath in a fashion that's already been described in the record with respect to your involvement in production of documents -- you recall we looked at page 53 and page 54 before lunch -- would you have at any time after 1985, whatever the month and date is, reviewed that document to determine whether or not it should be produced per a request by a plaintiff's lawyer in any litigation pending after the date of that document up until 1993?

MR. BERNICK: Do you understand that question? I take it what you're asking him is whether he did review this document for purposes of determining whether it should be produced in discovery.

MR. MOTLEY: Correct.

MR. BERNICK: Prior to what date?

MR. MOTLEY: The date of the affidavit.

THE WITNESS: Mr. Motley, Brown & Williamson has a lot of documents, and when we get a document production request, certainly like the ones we had in Texas during the 1980s, that asks to essentially empty out the files of the company, there are more documents than any 20 people I know could read in a year. And so -- I'm exaggerating, but clearly beyond the capability of one person to even come close to reviewing documents for a document request within the time available from the Court.

So I don't review documents in the event of document requests to determine whether they are called for by the document request. We hire law firms for that, and I just -- I just have to rely on them.

BY MR. MOTLEY:

Q. Okay. Then let me go at it this way. You've told us this morning that the lawyer, coordinating counsel in Minnesota, was in error when he said to Ms. Walburn that only five pages of documents had been produced, and you said there were 5 to 800 documents, and you said they were produced in the Dewey case? Where was the Dewey case pending?

A. Dewey was a New Jersey case.

Q. So then this -- these disgorging, if I could use that word, type requests for production in Texas resulted in the production of zero pages, I take it, to the plaintiffs' lawyers?

A. In the Texas litigation, my recollection is that the plaintiffs actually received no documents.

Q. So --

MR. BERNICK: I'm sorry, were you finished?

THE WITNESS: Yes.

BY MR. MOTLEY:

Q. So despite the fact that the plaintiffs' lawyers sought the disgorgement of all your documents, I believe, or words to that effect you said just a moment ago, they received zero pages of documents; is that your recollection?

A. They did receive zero pages of documents. There were several boxes on deposit waiting for them at Vincent & Elkins, but they never came by to get them.

Q. They were avid to learn that they were available but did not advantage themselves of the opportunity; is that your testimony?

A. That's correct.

Q. Do you know whether any documents that may bear the type handwriting that we find in the top right corner of number 11, that is, CTR/special projects, were amongst those two boxes of documents shipped to Vincent & Elkins for those Texas lawyers to look at?

A. It's a complex question, but I have to start with saying, I don't recognize the handwriting in the upper right-hand corner, and so I can't complete the rest of the question for you.

Q. Well, without reference -- I'm not suggesting that's your handwriting. I'm just asking you, can you tell us whether -- whether Brown & Williamson turned over to Vincent & Elkins for these Texas lawyers to look at these two boxes of documents, if included amongst those were any documents that bore reference to CTR/special products?

A. I don't recall.

Q. Can you tell me whether among the 5 to 800 pages of documents turned over to the Dewey plaintiff's counsel -- I believe it's the Gertler firm, right -- whatever the name of it is -- in New Jersey included any documents which bore the CTR/special projects reference?

A. I didn't look at -- I did not look at those documents to review them that were produced in the Dewey case; however, it's doubtful because the documents that were required to be produced in the Dewey case were limited to marketing documents.

Q. Would it not -- let me strike that.

MR. MOTLEY: We'll mark this -- actually, it was the Wilentz firm -- 12.

(PLF. EXH. 12, Request for Production of Documents in the matter of Dewey vs. R. J. Reynolds Tobacco Company, et al., was marked for identification.)

MR. BERNICK: While we're doing that, I think that we're probably coming on close to, if not exceeding, three hours of examination, and the order that we referred to and that you-all referred to, Mr. Motley, this morning for this case, specifies

that in the case of fact depositions -- my understanding is that this was a requirement that was advocated by the Plaintiff's counsel in this case -- fact depositions are to last -- are limited to three hours each.

MR. MOTLEY: The order does not apply to parties, sir. He is an 801 (d) capable witness to bind the corporation by his admissions.

MR. BERNICK: He wasn't --

MR. MOTLEY: I'm sorry. He's a managing agent under the Rules of Civil Procedure, and if that is your position, we will, of course, have to find guidance from the Court because that certainly wasn't the intention, to our knowledge, of the Court with fact witnesses. Parties are not even mentioned in this order.

MR. BERNICK: He was not noticed as a 30 (b) 6 witness. It says: This provision shall not include 30 (b) 6 witnesses designated by the defendants. It doesn't really even talk about -- I don't think it has any application to what you're saying. So I think that this witness is covered by the provisions of this order. I will say that I understand that you didn't anticipate that, and obviously, we have some flexibility to let the deposition continue.

My anticipation, based upon, I think, representations from either your office or Mr. Scruggs' office, was that this deposition would conclude today. I further note that very little of this deposition has had anything to do with ETS, which is the issue in the Butler case. For the most part, this deposition has been consumed with a whole variety of things that have appeared in the press, many of which, we've already seen, don't even involve Mr. Wells.

And I guess my position is that the deposition ought to conclude in a timely fashion. It ought to be focused on issues that really are in the Butler case as opposed to serving the interests that different people may have in litigation around the country. So we'll let it continue to go for a while, but if it continues to be as far afield as it is, then we're going to insist upon compliance with at least the spirit of this order, which I really don't think is being complied with here.

And I say that with all due respect to counsel.

MR. MOTLEY: Well, let me say without engaging in a colloquy, and we've -- I think everyone's conducted themselves in a very professional manner so far, and I think everyone is to be commended for that. We have no knowledge of any conversation by Mr. Scruggs' office with your office in regard to the Butler depositions.

Mr. Scruggs is not involved in Butler matters, as far as I know, is he?

MS. MCGREGOR: He is not counsel.

MR. MOTLEY: He is not counsel in the Butler matter. And we noticed it for day to day until completed, and I do note, as being a special whatever they call this in Mississippi, appointed by the attorney general, that -- that I am designated,



my office to take all live, quote, liability depositions and that we had -- had spoken either with Mr. Colingo or your local counsel in Mississippi about the reservation of two days this week for Mr. Wells.

Now, if that wasn't communicated, I apologize, but we were under the impression that we had all day today and all day tomorrow when we originally noticed it in both cases.

MR. BERNICK: Originally when this was noticed in the Moore case, it was noticed for two days.

MR. MOTLEY: Right.

MR. BERNICK: And then subsequently there was communication that said that it would be over the first day. And I'm not aware of anything that's changed that. And I'm not aware of anything that would call for the deviation from the -- this order is pretty plain.

As I said, I don't want to hassle you with the limited terms of the order.

MR. MOTLEY: No, I understand. I mean, we have an honest disagreement about whether depositions of parties or those who can bind parties by their statements under oath or not even under oath are -- come within the penumbra of the three-hour limitation or even the 30 (b) 6 matter.

MR. BERNICK: If you wanted him as a 30 (b) 6 witness or you wanted a 30 (b) 6 witness -- many of the things -- a 30 (b) 6 deposition likely would have produced a different person. A lot of things you've asked Mr. Wells about that he's not knowledgeable about. He is here as Kendrick Wells, and he's answering your questions as a fact witness, and I look at the terms of the order. They seem pretty plain to me. Let's continue on.

MR. MOTLEY: Let's -- let's -- let's -- until we get to a point of -- of disputation that causes us to call the judge, we'll muddle along here.

THE WITNESS: Counsel, I need about a five-minute break.

MR. BERNICK: Ron, while you're doing that, Kendrick would like a five-minute break.

MR. MOTLEY: Oh, no -- absolutely.

THE VIDEOGRAPHER: We'll go off the record at 2:55 PM.

(A recess transpired.)

(The following proceedings transpired off the video record.)

MR. MOTLEY: Mr. Wells, by attesting to the Interrogatories on behalf of the corporation is clearly the personification for the corporation as to matters in the Interrogatories and subjects himself under Mississippi procedure to the venue of the court. That's our position.

(Off-the-record conference.)

(A recess transpired.)

(The following proceedings transpired on the video and stenographic records.)

THE VIDEOGRAPHER: We're back on the record at 2:30 PM -- I'm sorry, 3:30 PM.

MR. BERNICK: Time flies. The witness

has a clarification answer to give on the purposes of CORESTA, and it bears also upon his ability to answer questions concerning exhibit 10. I instructed him not to answer questions on the content of exhibit 10.

It may be that there are parts of this that would not be privileged you can answer. So the witness has a supplemental answer to give.

MR. MOTLEY: I don't have a question. I'm satisfied with his answer. So can we move on to --

MR. BERNICK: Just so we're clear, you don't -- you don't want the record to be clear on his answers concerning exhibit 10? You have no interest in pursuing nonprivileged matters that relate to exhibit 10?

MR. MOTLEY: No.

MR. BERNICK: Is that correct?

MR. MOTLEY: Correct.

BY MR. MOTLEY:

Q. Mr. Wells, at any time prior to the issuance of Judge Sarokin's Order in Haynes about which we had discussions before lunch, did you ever come across a document which made reference to the CTR/special projects, any document in any context?

A. I've heard the name special 4. I may have seen a document, or I may have just heard about it.

Q. Were you involved in any fashion with -- excuse me one second, sir.

Did you understand, sir, that the purpose of special projects of CTR was to sponsor research relevant to the links between smoking and disease in order to develop a field of expert witnesses for defense of litigation in tort suits? Was that -- is that your understanding of one of the purposes of the special projects?

MR. BERNICK: You used the words special projects.

MR. MOTLEY: Yes.

MR. BERNICK: I think the question --

MR. MOTLEY: In quotation marks as some subset or part of CTR, scientific research.

MR. BERNICK: My -- my question and my objection to form would be special projects as a label may apply to a whole bunch of different things in your mind, and I don't know what the witness has in mind, but I think you ought to clarify what particular special projects you're talking about.

MR. MOTLEY: Okay.

BY MR. MOTLEY:

Q. Sir, on document number 11, in whose ever handwriting it might appear -- and by the way, the organization that's referred to there became Healthy Buildings International? Did you know that, ACVA Atlantic, Inc.?

A. I think I've read that in the newspaper.

Q. What -- when something has the designation or reference to CTR/special projects -- sometimes I see it in quotation marks -- what do you understand that to mean so that you and I are at least symmetrical in our understanding?

A. Thank you. I think that identifies it

for us. CTR special projects -- and I don't recall this particular one; there were several -- were a series of projects initiated and directed by outside litigation counsel for the industry. They were conducted for litigation purposes. The research was for publication at the discretion of the recipient. The tag -- the tag CTR special projects has misled a lot of people.

For some reason, a decision was made to involve the CTR accounting office in the payment and distribution of grant money for the CTR special project projects.

The structure of CTR, which makes it what it is, an outstanding institution for funding independent scientific research, was not involved. That is, the scientific advisory board, as I understand it, did not pass on CTR special project matters. It was essentially an accounting vehicle, and it got the name CTR special projects from that.

But it was a litigation directed and litigation purpose operation.

Q. Was there any commingling of scientists' projects between SAB-approved research and special projects-approved research? Do you understand what I'm saying? And I don't mean commingling --

A. No.

Q. -- in a -- in a nefarious or wicked sense. I mean -- let me start over. Were there instances where the same scientist would be the recipient of a CTR, SAB scientific advisory board approved research project and at the same time be the recipient of funds to do research selected or approved by outside counsel, as you just described?

A. I just don't know.

Q. Do you -- have you ever heard the name Dr. Seltzer --

A. Yes.

Q. -- as a recipient of CTR funds?

A. I've heard the name Dr. Seltzer. I know that he received either a CTR grant or a CTR special project. I don't know which.

Q. Or both?

A. Or both. I don't know.

Q. Same question, Dr. Wolf.

A. The only wolf that springs to mind is Sidney Wolf. That can't be --

Q. I doubt seriously y'all were giving him any money.

A. It can't be Sidney Wolf, so I don't -- don't know about Dr. Wolf.

Q. Dr. Friberg, F-R-I-B-E-R-G?

A. I don't know.

Q. Do you know a Dr. F. G. Colby, C-O-L-B-Y?

A. Frank? I know a Frank Colby.

Q. And how do you know him, sir?

A. Dr. Frank Colby was, in the capacity in which I associated with him, working for R. J. Reynolds with the responsibility of assisting R. J. Reynolds in keeping up with scientific developments regarding smoking and health, and I think he had some international responsibility in that regard.

Q. Okay. Do you know whether, within the CTR, there was an organization of lawyers who were

private counsel, that is, private law firms, who had a committee or a council, C-O-U-N-C-I-L, or group or whatever you want to call them that met from time to time to discuss scientific matters that included Shook, Hardy, someone from Shook, Hardy?

MR. BERNICK: Can I have the question read back, please?

(The Court Reporter read the question commencing on page 149 line 23.)

MR. GARNICK: I object to the form.

BY MR. MOTLEY:

Q. You can answer, sir.

A. I don't know.

Q. You don't. You have already told me -- I believe I won't misquote you when I say this -- that there was a group of house counsel like yourself -- I'm not saying you were part of the group -- but there were a group of lawyers who were employed by various tobacco entities, manufacturing entities, who met from time to time in the context of the CTR; is that correct?

A. I intended to say that I was not aware of that. I don't know.

Q. If there was such a group, you never attended such a meeting; is that fair?

A. I want to be certain. I don't recall ever attending such a meeting.

Q. Do you know, sir, whether when research project proposals were received from scientists, lawyers would direct it to the CTR? Lawyers were involved in the determination of whether that proposal would be sent to the SAB or sent to outside law firms for consideration for funding by special projects?

A. I don't know.

Q. Would Mr. Pepples have been more involved with the CTR than you were?

A. Mr. Pepples is more knowledgeable than I about the CTR.

Q. Do you know whether one of the goals or purposes of funding special projects, as you and I have come to define that mutually, was public relations as well as litigation?

MR. BERNICK: Are you talking about --

MR. GARNICK: I object to the form.

MR. MOTLEY: Special projects of the CTR.

MR. BERNICK: You're not talking about special accounts; you're talking special projects?

MR. MOTLEY: Yes, sir.

MR. BERNICK: Do you understand the question?

MR. GARNICK: I object to the form.

THE WITNESS: I don't know.

BY MR. MOTLEY:

Q. When Judge Sarokin wrote that there was -- and I'm not asking you to tell me whether you agree with him or not. I'm going to figure an opportunity to learn if anything occurred in your corporation as a result of what he wrote -- on page 681 of the 140 federal rules decision. Do you know whether your company or anyone in the law department reacted in any way of taking action after they read Judge Sarokin say at page 681, that decision making

regarding, quote, special projects, end of quote, and CTR projects further commingled defendants' legal and public relations interests with supposedly, quote, objective, end of quote, science?

MR. BERNICK: I don't know what the witness' answer would be in terms of whether anything was done, but without regard to that, the question calls for clearly privileged information. Even though you're focusing on conduct taken, you're focusing on conduct taken as evidence of a state of mind or an intent, that is, the reaction to the judge's opinion. Any reaction to the judge's opinion this witness may or may not have had would be privileged information and work product, as would be true for other people within the law department.

BY MR. MOTLEY:

Q. Well, let's go at it this way. Do you know -- first of all, without telling me who reached the decision or what the decision was, do you know whether the corporation, qua the corporation as an entity, took any action as a result of the comments of Judge Sarokin that I just read to you?

MR. BERNICK: That's a yes or no question? Right?

MR. MOTLEY: Yes, sir.

THE WITNESS: I do not know, and it's possible we issued -- made a statement to the press if anybody called us at the time, but that is unlikely. We were not a defendant in the case. Other than an immediate response to a reporter's question, I don't know of any.

BY MR. MOTLEY:

Q. Are you familiar with a 1961 memo from Arthur D. Little making reference to some cancer causing elements in cigarette tobacco?

MR. CARTY: Objection to the form.

THE WITNESS: That substantially -- that date substantially is before my tenure with the company; and on the information you have given me so far, I can't place anything.

BY MR. MOTLEY:

Q. Can you tell me, sir, whether in your searches that you made or had made at your direction, there was a location of a 1961 memo from Arthur D. Little in the files of your company that obviously predated your arrival there?

MR. BERNICK: Help me out. He just told you that he couldn't identify what you were talking about. On the basis of the way that you described it, how can he answer a question about whether a search was made for it? I'm just not understanding the question.

MR. MOTLEY: Well, what I'm asking is whether or not he knows if lawyers commissioned for the purpose of cataloging documents that we've been discussing today ever produced a list in which there was a reference to a 1961 Arthur D. Little memo, whether he saw it or not. And I think that's clearer than what I said before. I hope it is.

MR. BERNICK: Answer it if you can.

THE WITNESS: I'm afraid that's just beyond my ability to recollect.

BY MR. MOTLEY:

Q. Are you aware of a -- of a report by a Dr. Wakeham, W-A-K-E-H-A-M, listing particular compounds in cigarette smoke identified as carcinogens?

A. No. I recall that documents by Dr. Wakeham have been produced in cases in the Cipollone trial, for example. I don't recall that specific one.

Q. Produced by defendants other than your company?

A. That's correct.

Q. Because you weren't in the Cipollone case?

A. That's correct.

Q. Do you know whether the Wakeham report that was produced by another defendant in the Cipollone case was a document that has been located in the files of Brown & Williamson and identified by outside counsel in any list that may have been prepared of research reports?

A. I do not know.

Q. Sir, is it your understanding that the special projects division -- if I can use that word so that when I say that, it's the same thing we talked about earlier, a mutuality of understanding about what I meant when I said special projects -- that the special projects division was created in 1964 by the CTR?

A. I don't know.

Q. Do you know whether there are any documents memorializing -- in Brown & Williamson documents -- memorializing the history of the creation of the special projects division of the CTR?

A. I don't know. I'm sorry, did you say CTR or CTR special projects?

Q. Special projects. The history of the creation of the special projects division in CTR.

A. I don't know, Mr. Motley.

Q. In the Plaintiff's Exhibit -- I'll get the number in a minute -- the master summary that we identified, it reflects that counsel who prepared this at the request of Brown & Williamson -- this is exhibit 6 -- referred to CTR special projects as follows:

CTR special projects began in 1966. If you know that a document reflects a CTR special project, even though the document does not specifically refer to CTR, code to, quote, GEA:CTR special projects. Include an explanation in your comments.

First of all, sir, have you ever looked at this page 13 -- I'm sorry I didn't give you the page -- of exhibit 6?

MR. BERNICK: Exhibit 6?

MR. MOTLEY: Yes, sir, to the master summary.

I'm advised, while you're looking at that, David, that Judge Landrum is available for a telephone hearing if we want one on both the scope -- I think they called the secretary. Somebody in my office called his secretary to see if he was available to discuss the scope of the order insofar as these documents are concerned and the length of

the deposition. So if we decide we need to do that, he's -- he's available.

BY MR. MOTLEY:

Q. If you would be kind enough to look below the entry CTR special projects to the paragraph entitled defensive documents you will see --

MR. BERNICK: Did you withdraw your prior question?

MR. MOTLEY: No, no, no. I just -- so that it would be in context with the following paragraph.

BY MR. MOTLEY:

Q. -- you'll see a discussion of special projects, also.

A. I see that caption. Was there a specific reference?

Q. Yeah. If you would just look at it quickly to yourself.

A. The whole three paragraphs?

Q. Yes, sir.

MR. BERNICK: If you want to ask him whether he's familiar with this to see if there is any foundation for inquiring further, that's fine. If he is not, then there is no issue. If you want to ask him substantive questions about these paragraphs, this again is one of those documents that was not in the Butler submission. It's a UCSF document. It was not in the Butler submission. Do you want to ask him --

MR. MOTLEY: Has he read it?

MR. BERNICK: Have you read it,

Mr. Wells?

THE WITNESS: I read it just now, yes.

BY MR. MOTLEY:

Q. Okay. For foundational purposes in regard to this question that I'm coming to, is it not correct, sir, that your lawyers that you retained, you meaning your corporation, retained to do the coding and indexing and summary, summarizing, were given access in a place on Hill Street, I believe, to review copies of documents from Brown & Williamson's historical records and that these various summaries that we are referring to then are based on documents that they reviewed that you gave them to review, correct?

MR. BERNICK: Wait.

MR. MOTLEY: He said that this morning.

MR. BERNICK: No.

MR. MOTLEY: He didn't say that this morning?

MR. BERNICK: No. Because the second part of your question said that these summaries are based upon their review of the documents. And I don't think he testified this morning at all to what the substance of their review was.

MR. MOTLEY: Okay. Well, let me go start over.

MR. BERNICK: The first part of your question was whether they were given access yet. Go ahead and answer.

BY MR. MOTLEY:

Q. The answer to that is yes, right?

A. That's right.

MR. BERNICK: That is that they were given access?

MR. MOTLEY: Yeah.

THE WITNESS: We gave the lawyers who were to go through our files and make copies for purposes of defending litigation were given access to all our files.

BY MR. MOTLEY:

Q. Now, what came first, the review of the documents or the making out of whole cloth of categories and then the review of documents? Do you understand what I'm saying?

MR. BERNICK: We understand what you're suggesting, but I don't think it's a good question.

MR. MOTLEY: It's a leading question; there's no question about it.

BY MR. MOTLEY:

Q. But do you understand what I'm saying? Did the lawyers invent these categories before they looked at the documents?

A. I'm not sure this answers your question because of the different lists of categories we've got involved.

Q. I'm talking about the master summary.

A. All right. The master summary is years after the process started.

Q. So they had --

A. Are you asking which came first? 1989 is not a place to start.

Q. Okay. So the document reviews occurred before the creation of the master summary which was created in 1989 and is marked number 6, correct? We know, don't we --

A. Let me avoid the word before and just say that the document review had been going on for sometime by 1989.

Q. So they didn't create the document categories before they read the documents, at least in part, correct?

MR. BERNICK: You first referred to the summary. We know that the summary is a document, Plaintiff's Exhibit 6, that not only has categories; it then has a characterization or description of the categories. The question that you just now asked is the categories, and I don't know if there's been any testimony at what point in time in the process the categories were created.

MR. MOTLEY: Let's try it this way.

MR. BERNICK: If he even knows.

BY MR. MOTLEY:

Q. What does a subjective document review mean to you, sir, as a lawyer?

A. A subjective document review means that --

THE WITNESS: Wait a minute, is this privileged?

MR. BERNICK: You can answer the question generally; but as soon as we get back to this document, I think we're going to have to find out what the story is. There really is an issue with the order. Take it as far as you can get it. You can tell him what a subjective document review is.

THE WITNESS: All right. After documents



are selected by the lawyer team as being something they want to collect for purposes of defending the litigation and copies are made, the copies are then reviewed or some of them are -- reviewed in two passes. The first review is a review which -- I'm saying review. It really ought to be called coding because that's what is being done.

A data base entry is created for each document going through this coding process that has very -- very superficial identification kinds of category, what's the author, what's the date, maybe a couple of other things. A determination is then made as to whether this document looks like one that it might be worthwhile capturing some additional data on.

And when that determination is made, then the document was sent through a second coding process, which -- in which a member of the team analyzed the document according to some number of additional substantive categories.

BY MR. MOTLEY:

Q. Okay. And as a result of that second review, documents were placed in certain categories as are set forth definitionally in exhibit 6, the master summary, for subjective document review, correct?

MR. BERNICK: Let me have that back. I'm sorry, I was distracted by something.

(The Court Reporter read the question commencing on page 163 line 11.)

MR. BERNICK: I'm going to instruct him not to answer that question, because you at that point have now got him from a generic description and tying it into the particular categories and definitions set forth in this document. The particular categories set forth in this document are work product, and your question basically asks him to express views about the work product.

MR. MOTLEY: How many pages, David, do you contend were given by your client to Judge Landrum and the master and which will be privileged? In other words, this is one of the documents that you say the entirety of, correct? But you read into the record before lunch -- and I can't recall, is this the one that goes to page 6 or the one that goes to page 23?

MR. BERNICK: Let me clarify. We are working with a set of number books that were the UCSF notebooks as a whole, and we haven't distinguished within those notebooks which ones had been submitted in Butler, which ones have not been submitted in Butler.

I have asked, I can assure you, for the subset of the UCSF documents that were submitted in Butler. So when I was talking to you about the incomplete copy, that was an incomplete UCSF copy. To my understanding, it was not part of the submission in Butler. So no part of this document as I am told was submitted to the Court in Butler.

MR. MOTLEY: Well, we submitted --

MR. BERNICK: That's my present understanding.

MR. MOTLEY: So the record is at least

complete, not necessarily agreeably complete, we submitted full copies of these documents to the Court for their consideration, and obviously, that's a dispute we're going to have to resolve. But you're saying now that what your client submitted to Judge Landrum and the special master was bare of any page of exhibit 6; is that my understanding of what you said?

MR. BERNICK: That is what I am presently informed. I was not involved in the process, but that's my present information. But let me go on to say, the question that you've now posed to him even goes beyond the face of the document itself. Judge Landrum's Order talks about the documents. It doesn't talk about testimony that goes beyond the documents.

You have now asked him to get into an assessment, if he has one, of whether documents actually fit into these categories. That would require that he know about the underlying documents and what was done with them. And I don't know that he knows that, but I do know it goes beyond the scope of the document.

So it goes beyond the question of whether --

MR. MOTLEY: Well, we obviously have a disagreement there, but I think Mr. Wells is perfectly conversant with what went on with respect to this review, and I think I will be able to demonstrate that before we're done.

MR. BERNICK: Well, lay a good foundation. I don't know, either.

MR. MOTLEY: Well, he was doing pretty good describing for me what went on as he recalls it.

BY MR. MOTLEY:

Q. Let me try another way, sir.

Have you reviewed the partial document that counsel says was in the notebooks that are the entirety of what he has from the University of California at San Francisco?

A. I'm lost, Mr. Motley.

Q. Okay. Well, he's just told me that -- you see, there's two deals going here. One is in his notebook what he got from the University -- or somebody got from the University of California at San Francisco and put in those nice notebooks back there. The other is what your company submitted, he says, to Judge Landrum and the special master, which includes zero pages from Plaintiff's Exhibit 6.

And my question is, I believe he told me earlier that what was submitted to Judge Landrum only included the cover page and up to page 23, but I may be mistaken, of exhibit 6. I'm not saying that was given to Judge Landrum by your client. I'm just saying that that's in that notebook back there that was retrieved from the University of California at San Francisco.

Assuming I'm correct in my recollection, did you look at that document at all in the context of your affidavit, first question, that you submitted in the Maddox versus Williams case?

A. I'm sorry, I do get --

Q. This summary, the master summary. You told me you were familiar with it at one time?

A. That's what I'm looking for. I do understand the overlap issue, and now I'm not certain about which specific document on this table we're talking about.

Q. Okay. Let me start over. I thought you told me earlier that you were aware that there was a master summary prepared at the request of the law department with regard to the King & Spalding and Vincent & Elkins and Wyatt, Combs review of documents earlier today, did you not?

A. Yes.

Q. Okay. So prior to this proceeding, you were aware generally that there was a master summary, correct?

A. Yes.

Q. Okay. Now, because we seem to be playing with two decks of cards, one which has only part of the cards in it, and one which is a box with no cards in it, can you tell me whether you read the 23 cards in the box of cards that was found at the University of California at San Francisco?

MR. BERNICK: I object to the form of the question. Are you just asking him whether he reviewed this particular document?

MR. MOTLEY: Yes, sir.

MR. BERNICK: Why don't you just ask him if he knows or not? Isn't that much simpler?

BY MR. MOTLEY:

Q. Well, do you know whether you reviewed that document?

A. Prior to today?

Q. Yes, sir.

A. No, I did not.

Q. So your -- the information you have imparted on the record here is based on your general knowledge of the project as it evolved from 1985 until at least the date of this document, 1989, correct?

A. Yes. As our lawyers were working on their tasks, they told me what they were doing, as lawyers should do and kind of like to do, I think. But I did not -- I didn't spend any time with the document, the master summary.

Q. Who in the legal department would be most knowledgeable about the evolution of exhibit 6, the master summary?

A. I think I would.

Q. And so your knowledge -- and I don't mean this in any impertinent way -- the knowledge that you have of this document is the greatest we can find in the legal department?

A. Within the law department, I think that's right, no matter how poorly my memory is testing out here.

Q. Well, who at King & Spalding would have the greatest knowledge about this? Because we're going to visit with them if the judge lets us.

A. I think the most likely lawyer would be a lawyer named Dan Willoughby.

Q. Okay. And he's still there?

A. Yes.

Q. Now, so you -- one of the things you said in your deposition was you saw a need to have a more systematic way of retrieving these documents when you received Request for Production. Do you recall testifying to that in Maddox versus Williams, that this was part of your brainstorm? Not that you're the -- not that you're the sole creator of the project, but it was one of the things that you felt needed to be done, correct? The collection, collation, objective, subjective review of the documents?

A. We needed a systematic way when we got into discovery down in Texas. I'm a little sidetracked by more systematic.

Q. Well, okay --

A. That suggests a comparison --

Q. Let's say systematic then. Forget more.

A. Okay.

Q. So you are one of the persons who sponsored the notion that this, meaning the project which resulted in these three different summaries that we've been talking about, the chronology, the taxonomy, and the master summary, you were at least in part responsible for seeing the need to do that and commissioning that it be done?

MR. BERNICK: Now, you don't include three different documents in --

MR. MOTLEY: Let's stick with the master summary. But, you see the problem with your objection, David, is this is not just standing alone. This is part of, as he just said, an ongoing project.

MR. BERNICK: But you included the chronology.

MR. MOTLEY: Forget the chronology then.

THE WITNESS: I'm lost again because I thought the statement you were alluding to about systematic related to the systematic meaning well thought out and absolutely comprehensive search of relevant files to make sure we got all the documents that were relevant.

I didn't -- I don't recall a statement about the process of categorizing documents.

BY MR. MOTLEY:

Q. Are you telling me, sir, that you saw the need for a systematic review, as you just described it, retained the law firms, and sat back and had no discussions with them about the methodology they employed? Is that your testimony?

A. The law firms that did this work for us described their progress, described what they were doing, told me that they were using -- taxonomy is the word that I keep recalling -- using taxonomies, and told me how much work had gone into developing the taxonomies, which was an enormous amount of work.

But I simply didn't have the time to sit down and study the taxonomy.

Q. Well, I'm not -- let's get off the taxonomy now. You have testified under oath in the proceeding of Maddox versus Williams, sir, and I quote from page 35, line 17 and 20:

We, in response to Request to Produce,

also looked at things that the other side might think was interesting so that we could be prepared to deal with it. That's fairly standard.

And you went on at page 53 and 54 and described how comprehensive your search for documents that would be responsive to Request to Produce was. Is that not correct, both things?

MR. BERNICK: You have taken a few lines on page 35 out of a much longer answer.

MR. MOTLEY: Well --

MR. BERNICK: You're basically asking him whether they looked for documents that might be used by -- might be brought up in the litigation? And then you're also asking him whether they looked for what?

MR. MOTLEY: Well, he said, we expect our counsel in selecting documents to select documents that they believe were within the broader area of preparing to defend the litigation. Of course, they took into consideration issues that were being raised in the cases, but they looked beyond that. That's his words.

BY MR. MOTLEY:

Q. Is that correct?

A. Yes, that's correct.

Q. Okay. Then in the discharge of that burden, is it not correct, sir, that after the master summary was created, you answered Interrogatories under oath or attestation that all documents that were responsive had been searched, correct?

MR. BERNICK: We have no time frame.

MR. MOTLEY: I said after the--

MR. BERNICK: We have no case.

MR. MOTLEY: After the master summary was created, which says March 31st, 1989.

MR. BERNICK: Okay. He attested where?

MR. MOTLEY: Well, let's just start with this one.

BY MR. MOTLEY:

Q. How about Burl Butler?

MR. BERNICK: Where is Burl Butler in the document here?

MR. MOTLEY: He's deceased.

MR. BERNICK: That's your joke, Counsel, not mine.

MR. MOTLEY: That wasn't a joke. Sir, I apologize to you for that comment.

MR. BERNICK: Is there a particular interrogatory that you're referring to?

MR. MOTLEY: Yes. If you'll look to Response to Plaintiff's Request for Admission Number One --

MR. BERNICK: Yeah.

MR. MOTLEY: -- in exhibit number 2.

MR. BERNICK: As in blew it. Where is Burl Butler? All I got that you sent over here to my side of the table, Counsel, this morning is the Supplemental Responses to the First Interrogatories.

MR. MOTLEY: Well, let's -- let's start over again.

MR. BERNICK: Okay.

BY MR. MOTLEY:

Q. You've told me, Mr. Wells, that -- that

after 1989, you have attested on occasions to the -- the accuracy and truthfulness of responses filed in courts involving personal injury litigation, tobacco and health, correct?

A. I've verified them.

Q. Right.

A. Meaning certainly not that I know every document and have personally searched documents in lieu of every different discovery demand and interrogatory. In a way, we're sort of locked here into the next -- the penultimate frame of Raiders of the Lost Ark, a government warehouse that's a mile long. You can't even see the end of it with boxes and boxes and boxes.

That's way beyond my capacity. But it is within my capacity to ask people, to ask lawyers to look at these things and to report to me and to use my own experience and personal knowledge and decide whether to the best of my knowledge that I can verify the Answers to Interrogatories as correct.

Q. In the discharge of what you've just described, did you inquire as to whether or not the lawyers who told you that what they gave you so that you could attest to the responsiveness that you averred to had resorted to a review of the master summary in the exercise of the search that you delegated to them? Did you do that?

MR. BERNICK: Do you understand the question?

BY MR. MOTLEY:

Q. Let's do it this way: Tell me everything you did as a matter of practice to make sure when you put your name under oath to attest to the validity of a response that you signed for your corporation, what you did as a regular practice to assure yourself before you signed your name under oath that King & Spalding or Shook, Hardy or whoever you assigned the response for your consideration had done to make sure they had looked everywhere for every document that was responsive to the request?

MR. BERNICK: If you can do that.

MR. MOTLEY: Well, I hope he can do that because he attested to the accuracy of it.

MR. BERNICK: No, no. But again, it goes back to what we said this morning. You've got a bunch of difference responses that he gave. You obviously want to pursue the diligence that was followed in connection with those responses, and I understand that. But there are a bunch of them and they go back over years. You're asking of this witness an awful lot to search back in his memory without evening having a case and a response and a request in front of him.

I just don't think it's fair to the witness. Let's try --

MR. MOTLEY: Counsel, let me say this: I want to know, and I'm entitled to know, if he had a regular practice of things he asked that be done before he put his name as a general proposition. If his testimony is that he did it on a case-by-case ad hoc basis, then I want to know that.

MR. BERNICK: Well, answer the best you can.

THE WITNESS: I have some remaining confusion because I am confused as to whether we are talking about document demand specifications --  
BY MR. MOTLEY:

Q. Let's go with document demands.

A. All right. As to responding to document demands, I asked counsel whether they had checked against the litigation data base and whether they have involved their people with experience in working with our documents. Those people have a good feel for anything that might not be on the data base.

The data base is created as a result of -- as a product of the coding practice that I mentioned earlier and that's the basis for the inquiry that I make. And I also have to rely on the judgment and capability and skill of the lawyers we retain to do this.

Q. Okay. Are the lawyers that you retained to do this upon whom you rely the same law firm every time? That is, do you have counsel, King & Spalding, for example, who when you get a Request to Produce documents, that they are the ones to whom you turn to give you information upon which you relied to affix your name under oath to a response your company files?

A. I have some concern, Mr. Motley, that that may be privileged. That goes to defense counsel organization. I'm not sure this is a nonprivileged matter.

Q. Okay, let's do it this way. In the Butler case, to whom did you respond? To whom did you turn to -- to give you information upon which you affixed your name under oath that the responses were, in fact, proper?

A. King & Spalding.

Q. Okay. And who at King & Spalding?

A. I don't recall who I talked with.

Q. Did you ask the person at King & Spalding if they reviewed both the taxonomy and the master summary before they reported to you what was responsive documentwise?

MR. BERNICK: You can -- you can answer that question yes or no.

THE WITNESS: No.

BY MR. MOTLEY:

Q. So in the Butler case, we don't really know, do we, or do we, what King & Spalding looked at before they gave you information upon which you filed your response?

A. You know at least what they did because of my previous answer.

Q. The taxonomy.

A. No, sir. My previous answer was the litigation data base.

Q. Okay --

A. The --

MR. BERNICK: Excuse me.

THE WITNESS: The litigation data base is a product of work that includes the taxonomy.

BY MR. MOTLEY:

Q. And the master summary?

A. Well, I'm not sure how the master summary relates to taxonomy, because I am just not familiar

with documents except that they've been created and used.

Q. Well, sir, are you aware of the assignment of significance codes to documents as a general proposition?

A. I know it's done.

Q. Do you know what 1 stands for?

A. No, sir.

Q. Do you know what 4 stands for?

A. No, sir.

Q. When -- when you in the Butler case gave the assignment to King & Spalding to provide you with responsive answers to which you would affix your oath as an officer of the court and an officer for the purpose of answering the Interrogatories in that case of the corporation, did you -- what did you do other than telling them to use the -- what did you call it?

A. It's the litigation data base.

Q. -- litigation data base? Is that all you did? I'm not demeaning what -- what -- what that is, because I haven't had an opportunity to visit your computer.

A. I wish I had one with me sitting on my head. This is a tough test. Well, the numbers you mentioned, you threw at me a minute ago, were --

MR. BERNICK: You should not -- go ahead.

THE WITNESS: I was informed that King & Spalding had utilized the document data base, that they had considered whether there were other documents that might be responsive. We switched now to -- I'm sorry to interrupt, but it just occurs to me, by referring to Butler, I believe, have we shifted to an interrogatory from a document specification --

BY MR. MOTLEY:

Q. No, I'm again talking about requests for production. And this is -- was signed by you as Defendant Brown & Williamson Tobacco Corporation's Response to Plaintiff's First Request for Admission, Interrogatories and Request for Production of Documents. I only want to identify the -- that part of this document which deals with the Request for Production of Documents.

A. Oh, thank you.

Q. Okay?

MR. BERNICK: Do you have a copy of that?

MR. MOTLEY: Sure. Here. (Tendered)

MR. BERNICK: Okay.

THE WITNESS: To continue, I also asked them to consider whether they had -- I was informed that they had considered whether other documents were relevant to the demand that may not be on the data base -- not everything is coded on the data base -- and involved experienced people whom they have who have worked with our documents for years who know the entirety of our documents.

BY MR. MOTLEY:

Q. Well, would -- to your knowledge, would one of the tools that would be used by these knowledgeable people be Plaintiff's Exhibit 6, the master summary, subjective document review which was



prepared at least in part by King & Spalding?

MR. BERNICK: It's a yes or no or I don't know. I don't want to get into the substance because we're very, very close to work product here. So long as these questions are focused, as they have been, on procedure, I will allow you to answer them. But when we get into the substance of any analysis, I'm going to instruct you not to answer, so be aware of that as you answer Mr. Motley's questions.

THE WITNESS: Your question is still confusing to me as a procedural matter, because the data base that I referred to is a product which includes, among other things, the previous use of the taxonomy.

BY MR. MOTLEY:

Q. Yes. And you told me earlier that you understood the process to be an objective one, first, which I thought you said was the taxonomy, and then later, after the selection of documents that needed further scrutiny, the master summary was utilized. Am I incorrect?

A. I'd like to have it read back because I don't remember it that way.

Q. Well, tell me what the purpose of the master summary was for, then, if it wasn't a second pass at the documents? Perhaps I'm confused.

MR. BERNICK: I think you are. I think the witness has testified that he is not familiar with the taxonomy. And again, the taxonomy -- I'm sorry, the summary, at least the one that's been marked as exhibit 6. And again we have an issue on exhibit 6 in terms of its falling into -- inside or outside of the Court's order of January 22.

All that said, I don't know why this is such a contentious issue with respect to this witness. He said he's not even familiar with it.

MR. MOTLEY: That's not what he said.

MR. BERNICK: What's the question then? I don't understand the question. Go ahead and ask it, I'm sorry.

BY MR. MOTLEY:

Q. I just want to know why Brown & Williamson spent all this money preparing exhibit 6 if they don't ever use it when they file, and you file under oath, taking your name and putting it under oath in a Court, you don't even know whether they used the master summary.

A. Let me try one more time.

Q. Okay.

A. I'm not familiar with the master summary as a document. I've heard a description of its purpose. And what I call the taxonomy, I consider them the same functional kind of tool. They are prepared by counsel to suggest how documents retrieved from our files might be characterized as they apply to litigation.

It's one important kind of characterization to understand and to have coded is how might plaintiffs use this document, so one kind of characterization would call for essentially of opinions or judgment of the coder; if you were a plaintiff, what would you say this document was.

Q. Okay.

A. And other characteristics, such as one you just had me read, seem to call for characterizations by the coder regarding how -- regarding whether and how this document might be useful to present in the defense of the case.

Q. Okay. Would you please look at exhibit 7, which is the taxonomy.

MR. BERNICK: Before we do that, I want to take a real quick break. Maybe -- you want to go till 5:00, is that it, and then we'll just break at that time?

MR. MOTLEY: That's fine.

MR. BERNICK: Why don't we take a three-minute break, and the witness can take a look at -- what exhibit is it?

MR. MOTLEY: The taxonomy. Exhibit 7, page 31.

THE WITNESS: I don't think I have it.

THE VIDEOGRAPHER: We'll go off the record?

MR. MOTLEY: Uh-huh.

THE VIDEOGRAPHER: Off the record at 4:28.

(A recess transpired.)

THE VIDEOGRAPHER: We're back on the record, 4:40 PM.

BY MR. MOTLEY:

Q. Mr. Wells, have you ever seen a document, not of your corporation, but of another tobacco manufacturer that states to the effect that the CTR efforts to advertise no proven links between smoking and cancer functions as, quote, insurance, end of quote, for the tobacco industry?

A. It kind of rings a bell. Would you mind reading that again?

Q. Have you seen a document or reference to a document to the effect -- I'm not talking about in your files, although if it's in your files, I would dearly love to know it, but for the purpose of this first question, assume that it's not in your files:

That the CTR efforts to advertise no proven links between smoking and cancer functions, as, quote, insurance, end of quote, for the tobacco industry?

MR. BERNICK: Apart from what you're reading in Judge Sarokin's opinion, is that it?

THE WITNESS: There was a newspaper article a few years ago reciting parts of a document which used the word insurance and said something like that about CTR, but I don't remember it as quite what you read.

BY MR. MOTLEY:

Q. Are you -- are you familiar with a document dated October 6, 1966 transmitting the minutes of a September 30, 1966 meeting in regard to special projects which makes reference to a, quote, ad hoc committee, end of quote?

A. I don't recall that document.

Q. Are you familiar with a CTR committee of general counsel? You've told me you were, I believe, or did you not say that?

A. I said I was not -- I'm not aware of it.

Q. That's correct. You told me the person

that -- that to the extent anybody in the company is aware of it, it would be Mr. Pepples most likely?

A. That's right.

Q. Have you seen the notes of the September 10th, 1981 committee of general counsel as transmitted by a letter of September the 18th, 1981 to the law firm of Webster & Sheffield that reports the following dialogue, a Mr. Stevens? Do you know a Mr. Stevens that may be involved either as general counsel committee or in-house counsel for a tobacco company or somebody's outside counsel, that's spelled S-T-E-V-E-N-S?

A. Yes.

Q. Who is that, sir?

A. Arthur Stevens sits on the committee of counsel. He's the general counsel for Lorillard.

Q. So you do know that there is a committee of general counsel of the CTR?

A. I was referring to the committee of counsel of the Tobacco Institute.

Q. Do you know whether the committee of general counsel for the Tobacco Institute also functions in a similar fashion for the CTR?

A. Not in my experience.

Q. Okay. Mr. Stevens is quoted in the document saying, I need to know what the historical reasons were for the differences between the criteria for lawyers' special projects and CTR special projects, dot, dot, dot.

In other words, I don't know what the rest of the paragraph says because I don't have the document.

MR. GARNICK: I want to object to the use of or the reference of the documents in Sarokin's decision, which is what I believe you're doing, on the grounds that those documents are privileged, and, in fact, the third circuit took Judge Sarokin to task for publishing them in his opinion.

MR. MOTLEY: Thank you, sir.

MR. GARNICK: I ask for it to be a continuing objection.

MR. MOTLEY: Absolutely. You can have a continuing objection. I assume everyone adopts the objection.

BY MR. MOTLEY:

Q. And I'll move on and quote from Mr. Jacobs -- Mr. Jacob. Now, might that be someone you know?

A. I do know Mr. Jacobs.

Q. And who is he?

A. Edwin Jacobs is a partner with the law firm of Jacob, Medinger & Finnegan.

Q. And they are counsel for The American Tobacco Company among others?

A. I don't believe that's correct.

Q. Who are they counsel for, U. S. Tobacco Company?

A. As it pertains to the episode you are reading, Mr. Jacob was general counsel for CTR.

Q. Okay. Do they also represent any tobacco company in any fashion in litigation?

A. They represent -- they represent U. S. Tobacco in litigation.

Q. Mr. Jacob responded according to this excerpt --

A. Excuse me. They also represent a sister company of Brown & Williamson in litigation.

Q. What sister company is that?

A. British American Tobacco Company.

Q. Mr. Jacob says, quote:

When we started the CTR special projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers' special project.

And that's the end of the quote of Mr. Jacob. Then Mr. Stevens is reported as saying, quote:

He took offense from a scientific embarrassment to us, but not to CTR, end of quote.

Then Mr. Jacob is reported as saying: With Spielberg, we -- we were afraid of discovery for the FTC and Aviado. We wanted to protect it under the lawyers. We did not want it out in the open, end of quote.

My question to you, sir, is, do you have any idea who this Spielberg is? And I don't think they're talking about the producer.

A. Fair enough. I do not know Spielberg.

Q. Mr. Aviado or an entity called Aviado, A-V-I-A-D-O, can you help me with that?

A. I know generally about Dr. Domingo Aviado.

Q. Generally what do you know about him?

A. I know he is a scientist who served as a consultant. I don't recall whether he has ever been a witness. I think he has. I think he has appeared or submitted a statement as a witness for the industry, so I think he's done both from time to time.

Q. So you -- did Dr. Aviado do ETS research and testified in the OSHA hearings?

A. I have a vague recollection that Dr. Aviado may have done some ETS research. I don't recall. I don't know whether he testified in the OSHA hearings or not.

Q. By the way, do you equate ETS, side-stream, and secondhand smoke to be one and the same?

A. No.

Q. You don't?

A. No, I don't.

Q. What's the difference between secondhand and side-stream?

A. Side-stream smoke, as I understand it, is smoke that comes off the end of the cigarette. In other words, if you had a cigarette lying in an ashtray, and it was lit, you would get smoke from the burning end, and -- and that's what I understand people to mean when they say side-stream smoke.

Environmental tobacco smoke is different. It means the substance which is in the air of the room, and that's -- that's different.

Secondhand smoke, I think is commonly used to mean roughly the same thing as environmental tobacco smoke.

Q. Have you seen a list, sir, of scientists who have received grants from the special projects division of the CTR?

A. I don't recall.

Q. Does the name Charles Spielberger ring a bell when I give you a first name to go with the last name?

A. Mr. Motley, I still don't recognize that name.

MR. BERNICK: What page are we up to?

MR. MOTLEY: I'm on a roll. I'm on page 681.

BY MR. MOTLEY:

Q. Are you familiar with or have you seen notes from the September 10th meeting of the company counsel and ad hoc committee members? EJ, I assume, is Mr. Jacob. Do you know anyone else who would bear those initials who might be at such a meeting?

A. Can you help me? September the 10th?

Q. 1981.

A. 1981? I don't know whether -- I don't recall seeing it. I may have.

Q. What's Mr. Jacob's first name?

A. Mr. Jacob's initials would be EJJ.

Q. Okay. Well, let me see if what's quoted in this opinion is something that refreshes your memory: The difference between CTR and special 4, quote -- excuse me, parentheses, lawyers' projects, end of parentheses, director of CTR reviews special projects. If project was problem for CTR, use special 4.

I assume that refers to special 4 account.

Also, if there are work product claims, need the lawyers' projection, e.g., CTR's past director, Bill Gardner, that's G-A-R-D-N-E-R, didn't think much of Roe's work. Special 4 financed him and he has now published, e.g., motivational research that was done during the FTC investigation was done through special 4 because of possibility that CTR would be subpoenaed, e.g., Joe Janus, J-A-N-U-S -- a two-faced person in Rome, I suppose. Current study of cohort effect, those born in 1890 through 1910 is a full CTR project. Special 4 gave interim support.

Have you heard that passage from an alleged document dated September the 10th, 1981?

A. I don't recall.

Q. Can you help me with who Bill Gardner was?

A. To the best of my recollection, Bill Gardner was president of CTR. That's an administrative position within CTR.

Q. I'm sorry. Mr. --

A. But I get them confused. He may have been the scientific director. I -- I don't think so. I think he was president.

Q. Now, are you aware of a meeting held November the 17th, 1978 or -- excuse me, a memorandum dated November 17th, 1978 regarding a November 15th, 1978 meeting in New York?

MR. BERNICK: Any particular subject? Any attendees? Can you give me an address in New York?

MR. MOTLEY: Yes. Well, I'll give you more than that. I'll give you the witness' statement in regard to it in a moment.

THE WITNESS: If I've seen it, I don't recall it.

MR. MOTLEY: I don't have it up here.  
BY MR. MOTLEY:

Q. Have you seen a statement by Bill Shinn, S-H-I-N-N -- S-H-I-N-N, concerning the value of Council For Tobacco Research at any time in your legal career at Brown & Williamson?

MR. BERNICK: A statement by Bill Shinn on the value of CTR?

MR. MOTLEY: Uh-huh.

THE WITNESS: I don't recall, but it wouldn't surprise me to find that he has written such a statement.

BY MR. MOTLEY:

Q. Have you ever made any observations about such a -- to your current recollection, a statement by Bill Shinn concerning the value of the Council For Tobacco Research?

A. I don't recall.

Q. Who was Mr. C. I. McCarty?

A. Mr. McCarty was an executive who was promoted several times, wound up as CEO of Brown & Williamson Tobacco Corporation, and subsequently became CEO of BATUS, Inc.

Q. Are you familiar with a file maintained in the legal department called CTR general?

A. Other than recognizing it as a generic label, no.

MR. MOTLEY: This will be the last few questions I ask. I want to ask him about this document for today.

BY MR. MOTLEY:

Q. I'm going to hand you -- this is, what, 13 -- let's hope this isn't unlucky. This is 13. It's dated September 1978.

(PLF. EXH. 13, Memorandum from Mr. E. Pepples to Mr. C. I. McCarty dated 9/29/78, was marked for identification.)

MR. MOTLEY: Can you let him look at it for me, please?

BY MR. MOTLEY:

Q. Mr. Pepples, we've already identified. And were you reporting to Mr. Pepples in September, 1978?

A. Yes, sir.

Q. Have you seen this document before?

A. The question is, have I seen it?

Q. Before. Yes, sir, before.

A. I may have, but I can't recall.

Q. Well, is that a document that -- that you stated in your affidavit in the Maddox versus Williams matter that was in the box of documents that you reviewed which were obtained from Merrell Williams and in which affidavit you swore that said document had never been produced in litigation as of the date of that affidavit, which is 1993?

A. The question is?

Q. If it was in the box that had never been produced, right? It was in the magic box, Merrell

Williams' magic box.

A. It had never been produced?

Q. Correct.

A. That's correct.

MR. BERNICK: Your question is whether a privileged document had been produced in discovery before?

MR. MOTLEY: Yeah. You mean it's privileged because y'all stamp privilege on it? It does say -- it does have the stamp privileged on it; I'll give you that.

BY MR. MOTLEY:

Q. Have you seen it prior -- let's divorce the review of Merrell Williams' box in the preparation of your affidavit, okay, from historical Circa 1978 matters, okay?

Can you tell me having reported to Mr. Pepples and been -- and being involved in tobacco litigation discovery matters, as you stated in page 53 and page 54 of your deposition in Maddox versus Williams, can you tell me whether in the regular course of business, it is more likely so than not that you would have received the document labeled Plaintiff's Exhibit 13 to this deposition?

MR. BERNICK: Kind of a balance of probabilities type of thing, more likely than not.

BY MR. MOTLEY:

Q. To a reasonable degree of law department certainty, if such is not an oxymoron.

MR. BERNICK: I hate to tell you, Ron, but judging how I look at your post-its on your paper, I'm not sure how your files look either, but that's okay.

MR. MOTLEY: I can assure you they don't look like this.

THE WITNESS: I don't recall.

BY MR. MOTLEY:

Q. Let me ask it this way: Given what you told Mr. Fox DeMoisey in your 1994 deposition about your active involvement, everyday involvement in Request for Production of documents from 1972 forward, inclusive of 1978, and given the fact that this document, exhibit 13, makes reference to a discovery request in a case called Monroe, is it not accurate to say that this document is one that would have passed to your attention in 1978? If you'll look at the second paragraph.

A. I don't see a reference to a document production.

Q. No. Discovery request. It says interrogatory propounded. I didn't mean to mislead you if you misunderstood what I said or if I misstated.

A. In my experience, Interrogatories rarely call for identification of specific documents, and my recollection also is that the Monroe case was rapidly winding down by September of 1978. And I don't recall any production in the Monroe case September 29th, 1978 or more recently.

Q. Well, let me ask it this way, and we'll conclude this -- about this document for today. This document says that the reply to the interrogatory -- and I don't know when the interrogatory was filed.

It may have been filed in 1977 for all I know -- a reply to a question propounded by Mr. Monroe asking what we had done to keep abreast of the science concerning our product.

Our reply tells about the ten imminent scientists who serve on the SAB in an advisory capacity at CTR, and it tells about the grants which CTR has made over ten years. Stated another way, our answer says CTR is our window on the world of smoking and health research. This avoids the research dilemma presented to a responsible manufacturer of cigarettes, which on the one hand needs to know the state of the art, and on the other hand cannot afford the risk of having in-house work turned sour.

The first question, did I read that correctly into the record, sir?

A. It seems to be.

Q. Okay. The second question is, sir, do you know whether the answer that was your reply in the Monroe case made reference --

A. The first question was is it correct?

Q. Yes.

A. I understand.

Q. You said that was okay?

A. Yeah.

Q. Okay. The second question is, sir: Do you know whether the response in the Monroe case to the interrogatory that Mr. Monroe propounded made any reference to research done by B.A.T, which was in the possession and files of B&W at the time the reply was filed with the court?

MR. BIERSTEKER: Object to the form.

THE COURT REPORTER: Who was that objection by?

MR. BIERSTEKER: Object to the form.

BY MR. MOTLEY:

Q. In other words, do you know whether or not you guys mentioned Hippo or Ariel, A-R-I-E-L, in the response in the Monroe case?

A. I don't recall the interrogatory response.

Q. Do you know, sir, whether or not within the legal department there exists a record of the reply that was filed in the Monroe case?

A. I do not.

Q. Okay. Do you know whether in the response to the requirement that you ship, you said boxes and boxes of documents to Minnesota, there might be found in one of those boxes on the way to St. Paul the Monroe Answers to Interrogatories?

A. That's really the same question. If it's called for in Minnesota, and we have it, then it will get put in the document depository up there.

Q. Okay. And the final question I have, sir: Do you know whether in 1978 or 1977 or whenever the Monroe Answers were filed, Brown & Williamson provided in response to Interrogatories, at least this interrogatory, calling for research, a privilege log listing those projects in your possession which were funded by special account 4 to which you claimed privilege?

MR. BIERSTEKER: Object to the form.

MR. BERNICK: Let me have the question



back, please.

(The Court Reporter read the question commencing on page 202 line 13.)

THE WITNESS: Mr. Motley, Rex Monroe's claim was that the menthol in Kool cigarettes caused him to have hemorrhoids. I don't think --

BY MR. MOTLEY:

Q. He must have coughed an awful lot.

A. I don't think that we provided --

MR. BERNICK: That's your joke again, Counsel.

THE WITNESS: I don't think that we provided a -- any document discovery that I remember. If we did, I don't think the special account 4 research would have been relevant to it. But I -- I don't know.

BY MR. MOTLEY:

Q. So you don't know whether a privilege log was attached in response to the Interrogatories seeking to elicit not hemorrhoid research, but what we had done to keep abreast of the science concerning our product? It doesn't delimit it to menthol and hemorrhoids, does it, at least the document that I have in my hand, exhibit 13?

A. I don't understand the question.

Q. Well, the document I have in my hand does not delimit the response that's called for by restricting it to menthol and hemorrhoids, does it?

A. Well, it seems to be a process -- it seems to deal with how the company keeps up with smoking and health scientific developments. And, again, it's still talking about Interrogatories. Your experience is much broader than mine.

I've never seen an interrogatory that called for a privilege log.

Q. Well, if you file an Answer or Reply, as Mr. Pepples characterized it, telling about the grants that CTR has made over -- over ten years, you obviously provided a list of grants of some kind in your Answer to Interrogatory, didn't you?

MR. BERNICK: Counsel, at this point, it's after 5:00; it's late in the day.

MR. MOTLEY: Okay. That's all right. We can quit right now if you want to.

MR. BERNICK: I'm not going to cut you off. If you want to ask more questions about that, it's fine, but it really does seem to me the witness has told you he doesn't recall. He doesn't have a document in front of him. You've asked essentially for a document. What are we pursuing this for?

You're not going to find out anything more about it.

MR. MOTLEY: Well, let me finish this up by asking him this question.

MR. BERNICK: Go ahead.

BY MR. MOTLEY:

Q. Do you know, sir, whether or not at any time when you have signed your name to the truthfulness of a response to an interrogatory or a Request for Production you have provided along with that a privilege log which lists Plaintiff's Exhibit Number 13 as that -- as a document for which you claim a privilege at any time up until the time you

filed your affidavit in Maddox versus Williams?

MR. BERNICK: Do you understand the question?

THE WITNESS: Yes. I have to get there -- no, wait a minute. At any time until that affidavit?

BY MR. MOTLEY:

Q. Yes.

A. The timing gets --

Q. That's all right. 1978 to 1993 that you filed a sworn response to interrogatories or requests to produce where you would have listed a privilege log or attached a privilege log which contained reference to Plaintiff's Exhibit Number 13.

A. I believe that if a request had been made to the company that covered this exhibit that we would have listed it on a privilege log, but I just don't recall.

Q. Final question: Can you tell me, sir, whether at any time you have sworn to the veracity and accuracy of Requests for Production or Interrogatories, you personally put your name on the line, and where the question called specifically for the history or information about the history of the CTR and/or the special projects division, you have attached a privilege log which made reference to Plaintiff's Exhibit 13?

MR. BERNICK: You know, at this point, we've got a whole bunch of hypotheticals.

MR. MOTLEY: That's not a hypothetical, sir.

MR. BERNICK: No, no. Because you haven't established that the request was made. You haven't established what the response was, and you're assuming that there was a request, a response, a requirement for a privilege log, and then does this document makes its way on it.

MR. MOTLEY: I'm asking him what he did. I'm not asking him -- I'm not hypothesizing that he did it or didn't do it. I'm asking him if he recalls whether he did or didn't.

MR. BERNICK: Object to the form of the question then. Lack of foundation. Answer if you can.

THE WITNESS: I don't recall.

MR. BERNICK: I've got a matter to take up briefly on the record before we break for today.

MR. MOTLEY: Yes, sir.

MR. BERNICK: If you're done asking questions for today.

MR. MOTLEY: I am, sir, pursuant to our previous discussion.

MR. BERNICK: There were a series of questions that were asked earlier on today that I think really are extremely misleading, and I'll adopt the assumption that it was unintentionally so. But it's disturbing to me because it creates a very false impression of the litigation record in another case, and I assume that -- that the suggestions were inadvertent because I know that you're not counsel in that case.

But you represented to the jury that's going to be watching this videotape and you

represented to everybody in this room that certain submissions of information were made to lawyers in Minnesota, and they were left with the impression unchanged about certain information provided by B&W concerning document production in earlier cases. And I'm having specific reference to the 1981 letter. No, it's 1980 -- let's get it.

MR. MOTLEY: This is it right here.

MR. McGAHAN: April of '95.

MR. MOTLEY: Here it is. That's it right here.

MR. BERNICK: That doesn't have the highlighting on it? Yeah, okay. April 21, 1995 letter from Munger, Tolles to Ms. Walburn. In point of fact, additional information was provided by B&W to the plaintiffs in Minnesota concerning this very same subject on numbers of documents that were produced in the Dewey case. And again, I'm assuming that your questions when they focused only on one element of an extended series of correspondence and communication, that your questions were based upon your not knowing about the rest of the correspondence. Is that so?

MR. MOTLEY: Well, if you will tell me what the correspondence is, I'll be glad to look at it.

MR. BERNICK: It's not my obligation, but there is a whole series of correspondence during the balance of 1995 clarifying B&W's Answer to the requests that have been made for information and particularly the numbers of documents that had been produced to Plaintiffs in the Dewey case.

MR. MOTLEY: Tell me what it is.

MR. BERNICK: Again, not my obligation to do that --

MR. MOTLEY: Then --

MR. BERNICK: Excuse me. At a certain point in the deposition, we may conduct an examination on the subject. But I would have assumed that if you made requests of people who were involved in the Minnesota litigation that you would have asked for all the correspondence on the subject. And it's not really my obligation to ensure that you make that type of request.

And I say this respectfully. I'm not -- I'm not quarreling with your conduct. I'm just saying that there was a very serious misimpression that was left, and I'd like to clear it up.

BY MR. MOTLEY:

Q. Mr. Wells, are you aware of the subsequent correspondence to which counsel refers?

A. I understand that a correction was made.

Q. Why didn't you tell me about it earlier today?

A. I don't know the details.

Q. Have you seen the correction that was made?

A. I don't recall.

Q. Well, do you know the substance of the correction that was made? I mean, did we go from five pages to 500 to 800 pages, as you said earlier, or did we go from five pages to 5 million pages, or what is it, if you know?

A. I heard only that a supplement was given, and if I heard the numbers, I don't recall.

Q. Well, do you know whether the supplement would -- if given to us would -- would change -- strike that -- would reflect adversely on the accuracy of your mental recollection that there were 500 to 800 pages produced?

MR. BERNICK: Object to the form of the question.

BY MR. MOTLEY:

Q. In other words --

A. I don't know that unless we know what it says.

Q. Well, what did you base your 5 to 800 pages on?

A. That was based on my contemporaneous recollection at the time that our lawyers told me they were going to make the production in the Dewey case.

Q. Well, I mean, I don't know why we're dancing around the head of this pin. Why don't you just tell me what it said, because I'm going to -- I'll get it eventually.

MR. BERNICK: We'll pursue this later on in the deposition. I'm just raising it as a point, that when you pick a document up and start asking a bunch of questions about the conduct of lawyers and the conduct of the company in another case, my assumption would be that you've got all the documents and that you know the full information about what took place in connection with that case, not just -- not just the beginning letter.

MR. MOTLEY: Well, obviously you know more about it than I do so why don't you just help me along and tell me how pages they finally ended up confessing to have produced and --

MR. BERNICK: In due course we will, but it's quite consistent with the witness' recollection.

MR. MOTLEY: Very good. That's all I wanted to know.

BY MR. MOTLEY:

Q. And thank you, Mr. Wells. I hope you have a nice night.

A. Same to you.

THE VIDEOGRAPHER: We'll go off the record at --

MR. MOTLEY: Start back at 9:30 in the morning and talk -- and see what happens --

MR. BERNICK: And finish tomorrow. We're going to focus on ETS and we're going to finish tomorrow.

MR. MOTLEY: We are?

MR. BERNICK: Absolutely. If you want to pursue some other matters, we'll pick another forum.

THE COURT REPORTER: Wait a minute. Is he off the --

THE VIDEOGRAPHER: We will close the record at 5:18.

(The deposition was recessed at 5:18 PM.)

SIGNATURE OF DEPONENT

I, the undersigned, J. KENDRICK WELLS, III, do hereby certify that I have read the foregoing

deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON
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J. KENDRICK WELLS, III Date

A. WILLIAM ROBERTS, JR., & ASSOCIATES

CERTIFICATE OF REPORTER

I, A. William Roberts, Jr., Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the witness was duly sworn to testify to the truth, the whole truth, and nothing but the truth by Paul Klapheke, a Notary Public for the State of Kentucky; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing deposition as typed is a true, accurate, and complete record of the testimony of the witness and of all objections made at the time of the examination.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 3rd day of February, 1996 at Charleston, Charleston County, South Carolina.

Jr.

Registered Professional

My Commission expires

A. WILLIAM ROBERTS, JR., & ASSOCIATES

I N D E X

A. William Roberts,  
Reporter, CP, CM  
May 22, 2001

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